FEDERAL COMMUNICATIONS COMMISSION ENFORCEMENT BUREAU MARKET DISPUTES RESOLUTION DIVISION

Fiber Technologies Networks, LLC,)
Complainant,)
v.	Proceeding No. 14-227
Duke Energy Indiana, Inc., et al.,) File No. EB-14-MD-015
Respondents.)))

RESPONSE TO POLE ATTACHMENT COMPLAINT

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RESPONSE TO POLE ATTACHMENT COMPLAINT

Duke Energy Indiana, Inc. ("DEI"), Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, Inc. ("DEP") (collectively "Duke Energy") respond to the Pole Attachment Complaint filed by Fiber Technologies Networks, LLC ("Fibertech") as follows:

I. SUMMARY AND INTRODUCTION

Duke Energy's standards specifically facilitate small cell and other wireless antenna pole attachments. Duke Energy was, in fact, ahead of the curve in creating standards to accommodate wireless antenna pole attachments on both primary and secondary distribution poles. This is not a case about whether Fibertech can attach its antenna to Duke Energy's poles. Nor is this a case about whether Fibertech can make such attachments on the pole tops. Duke Energy's standards specifically allow for pole top antenna attachments. Instead, this is a case about whether Fibertech's preferred configuration for cumbersome ancillary equipment attachments beneath the communications space should be elevated over Duke Energy's non-discriminatory standards requiring that such equipment be pad or pedestal mounted in the right-of-way.

Duke Energy's standards do not—as Fibertech contends—prohibit ancillary equipment attachments beneath the communications space. In addition to providing for the attachment of the antenna itself, the standards also specifically permit attachment of "the cable feeding the antenna and the cable feeding the amplifier in the pedestal." But the standards reasonably require—as many similar standards require—that other equipment (such as cabinets, power supplies, amplifiers, batter back-ups and meter bases) be mounted on a pad or pedestal in the right-of-way at least five feet from the base of the pole. Duke Energy has at least twice advised Fibertech in writing that it would consider granting an exception to the standard under extenuating circumstances, such as if a municipality prohibits pad/pedestal mounted equipment

in the right-of-way—in other words, in the unlikely situation where Duke Energy's standards serve as an actual impediment to deployment, rather than a mere inconvenience to Fibertech's preferences.

But Fibertech insists, despite Duke Energy's non-discriminatory standards, that it be allowed to attach whatever equipment it wants beneath the communications space on Duke Energy's poles. Fibertech's argument is not based on any alleged inability to deploy. Fibertech has never alleged (let alone demonstrated) that Duke Energy's standards are a barrier to Instead, the crux of Fibertech's argument is that, if some utilities allow deployment. cumbersome pole-mounted equipment beneath the communications space (and presumably have reached the conclusion that it can be done safely, reliably and consistent with its work practices), then all other utilities should allow it too. This "lowest common denominator" approach to system engineering is not only bad policy, but also contrary to the Commission's settled precedent. The Commission has long recognized that, in addition to industry-wide standards, "a utility normally will have its own operating standards that dictate conditions of access" and that "[s]tandards vary between companies and across different regions of the country based on the experiences of each utility." There mere fact that different utilities reach different conclusions on a matter of system engineering does not mean that one is right and the other is wrong. It simply means, as the Commission has recognized that "the experiences of each utility" are different.

The ancillary equipment standard at issue in this case has been in place within DEP's service area for more than 30 years. As a result of the merger between Duke Energy Corporation and Progress Energy, Inc. in 2012, the distribution standards departments from both companies

¹ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499, ¶1148 (Adopted Aug. 1, 1996).

evaluated numerous standards from the respective companies for purposes of adopting a unified, system-wide set of standards and best practices. The combined companies adopted the DEP standard because it was viewed as the best practice. In addition to reducing climbing impediments and maximizing options for pole replacements, the DEP standard also minimizes fall hazards to linemen. Furthermore, the engineering issue at stake is not limited to a single pole (or even a small group of poles), but instead touches the entire distribution system. The cumulative effects of any practice are far greater than the impact of such practice on any single pole, and the very purpose of standards is to balance these concerns. Fibertech has the luxury of focusing on a few poles in a specific market. Duke Energy has to consider its *entire* system in light of its non-discriminatory access obligations.

Fibertech spends the vast majority of its complaint raging about a standard that (a) Fibertech was never interested in using, and (b) Duke Energy withdrew before Fibertech or any other carrier requested access under that standard. Under this since-withdrawn standard, which was developed specifically at the request of another carrier who ultimately pursued other options, Duke Energy would have owned a pole mounted equipment cabinet on select poles into which ancillary equipment could be placed. Duke Energy's ownership of, and complete control over, the equipment cabinet was key. But this standard is a nullity. No carrier ever deployed under this standard and Duke Energy has withdrawn it. In fact, Fibertech's reaction to this erstwhile standard will have a chilling effect on Duke Energy's willingness to "think outside the box" or beyond its comfort zone in an effort to work creatively with carriers on solutions that make sense for all parties.

In addition to its substantive deficiencies, Fibertech's complaint suffers from several procedural flaws. First, Fibertech erroneously contends that the state of Indiana lacks

jurisdiction over pole attachments. Though Indiana is not on the Commission's current list of "certified" states, and even though there may be some pole attachment relationships that are outside the reach of the Indiana Utilities Regulatory Commission's ("IURC") jurisdiction, it is clear that the IURC has jurisdiction over this specific pole attachment dispute between two "public utilities" as that term is defined by Indiana law. Regardless of whether the IURC's jurisdiction is exclusive or concurrent, the IURC is the proper forum for resolving this dispute (at least as to DEI) which, at its core, challenges DEI's distribution system standards. Second, Fibertech failed to even request—let alone participate in—an executive level meeting with DEC or DEP. Fibertech requested, and Duke Energy staffed, an executive-level meeting with DEI. After the meeting Fibertech attempted to end-run the Commission's executive-level meeting rule through self-serving correspondence, but Duke Energy specifically advised Fibertech in writing that different executives would be involved in meetings for DEC and DEP. Nevertheless, Fibertech proceeded with filing its complaint against DEC and DEP despite the failure to comply with the Commission's pre-complaint rules.

Fibertech has yet to execute an agreement for small cell antenna attachments with any of the respondents. Fibertech has not yet submitted a single application for a small cell antenna attachment to any of the respondents. There has not been a denial of access by Duke Energy; there is only a Duke Energy standard that Fibertech dislikes. But Fibertech's preferred configuration for location of equipment ancillary to its small cell antennas should not be elevated over Duke Energy's non-discriminatory standards. The Commission should be particularly reluctant to grant Fibertech its requested relief given the IURC's jurisdiction over the only "ripe" dispute (between DEI and Fibertech), and given Fibertech's failure to comply with the Commission's pre-complaint requirements with respect to DEC and DEP. The Commission

should dismiss, deny or hold in abeyance Fibertech's complaint in its entirety for any of these substantive or procedural reasons.

II. JURISDICTION AND PARTIES

1. Duke Energy lacks knowledge or information sufficient to admit or deny whether the Commission has jurisdiction over this action for two separate reasons. First, as it relates to DEI, it appears the Indiana Utility Regulatory Commission ("IURC") may have jurisdiction over this dispute pursuant to Ind. Code § 8-1-2-5, and that the IURC may intend to exercise its jurisdiction over this dispute. At a minimum, it appears the IURC may have concurrent jurisdiction over this dispute. The IURC's jurisdiction *may* serve to displace the Commission's jurisdiction; even without a "certification" from the IURC.³ Second, as it relates to DEC and DEP, Fibertech has not complied with the Commission's executive level meeting rule.⁴ Fibertech requested—and Duke Energy staffed—an executive-level meeting with DEI.⁵ This meeting occurred on August 4, 2014 at DEI's headquarters in Plainfield, Indiana.⁶ Even after this meeting, while Fibertech was attempting to "ripen" its complaint against DEC and DEP through correspondence without actually following the Commission's executive-level discussion rules,

² *See* Email from Beth Krogel Roads, General Counsel for the Indiana Utility Regulatory Commission, dated Dec. 5, 2014.

³ See 47 U.S.C. §224(c)(7)("Nothing in this section shall be construed to apply to, or give the commission jurisdiction . . . in any case where such matters are regulated by a state."); see also 47 C.F.R. §1.1414(a)(explaining that lack of certification merely creates a rebuttable presumption "that the state is not regulating pole attachments").

⁴ 47 C.F.R. §1.1404(k).

⁵ Declaration of Scott Freeburn ¶20 (Dec. 17, 2014) Attached hereto at Appendix C ("Freeburn Decl."); Declaration of Robert Sipes ¶15 (Dec. 17, 2014), Attached hereto at Appendix D ("Sipes Decl.").

⁶ See Letter from Karol Mack of Duke-Energy dated July 21, 2014, Attached hereto as Appendix A ¶1; Freeburn Decl. ¶20; Sipes Decl. ¶15.

Duke Energy made it clear that "different executives would be involved in the decision-making." Duke Energy also stated that "[t]he ultimate decisions on any business issue are inherently local, even if the decision-making begins with standards and policies similar to those in other jurisdictions," and that "[Duke Energy] believe[s] it is an overgeneralization to state that 'the demands regarding access to unusable space for all of [Duke Energy's] states are the same as have been articulated for Indiana.'"

- 2. Duke Energy denies the allegations in paragraph 2, as stated. Section 224(b), which makes no mention at all of "non-discriminatory access" (this phrase appears *only* in Section 224(f)), speaks for itself.
- 3. Upon information and belief, Duke Energy admits that Fibertech holds a Certificate of Territorial Authority ("CTA") from the Indiana Utility Regulatory Commission ("IURC"), and that Fibertech is a "public utility" as that term is used in Ind. Code §8-1-2-5.9 Fibertech's CTA in Indiana gives Fibertech broad authority "to utilize public rights-of-way for its telecommunications facilities and services." Duke Energy lacks knowledge or information sufficient to form a belief as to whether Fibertech actually provides any telecommunication services in the state of Indiana, especially if there is a legal distinction between the "provision" and the "offering" of services (an issue on which Duke Energy takes no position for purposes of this proceeding).
 - 4. Upon information and belief, Duke Energy admits the allegations in paragraph 4.

⁷ *See* Exh. 11 to the Ernst Decl. ¶6, email from Karol P. Mack, Duke Energy, to Natasha Ernst, Director Small Cell Deployment, Fibertech (October 8, 2014).

⁸ *Id*.

⁹ See Exh. 12 to the Ernst Decl., Certificate of Territorial Authority, at 10 (Sept. 11, 2001).

¹⁰ *Id.* at 9.

- 5-7. Duke Energy admits the allegations in paragraph 5-7.
- 8. Duke Energy admits that the states of Indiana and North Carolina have not "certified" that they regulate pole attachments. The state of Indiana, though, *does* regulate relationships between public utilities for the use of poles, which may have the effect displacing the Commission's jurisdiction over certain pole attachment disputes.¹¹
 - 9. Duke Energy admits the allegations in paragraph 9.

III. BACKGROUND AND FACTS

- 10. Duke Energy lacks knowledge or information sufficient to admit or deny the allegations in paragraph 10 and therefore denies the allegations.
- 11. Duke Energy lacks knowledge or information sufficient to admit or deny the allegations in the first sentence of paragraph 11 and therefore denies the allegations. With respect to the allegations in the second and third sentences of paragraph 11, Duke Energy admits that the description of equipment is consistent with technical information provided to DEI by Fibertech, but Duke Energy lacks knowledge or information regarding what facilities are "required" or what Fibertech's installations "typically" include and therefore denies the allegations. With respect to the allegations in the fourth sentence of paragraph 11, Duke Energy admits that Fibertech's "preferred configuration" involves the attachment of significant equipment enclosures to the pole beneath the communications space, but lacks knowledge or information sufficient to form a belief as to whether this arrangement—which is inconsistent with Duke Energy's standards—is "typical" for Fibertech and therefore denies the allegations.

 $^{^{11}}See$ Ind. Code Ann. §8-1-2-5 (West) (requiring "[e]very public utility . . . having . . poles" to "permit the use of the same by any other public utility" and providing the IURC with authority to "direct that such use be permitted and prescribe reasonable conditions and compensations for such joint use").

Duke Energy also denies that Fibertech's motives for its "preferred configuration" are driven by pedestrian or passer-by safety. Upon information and belief, the motives for Fibertech's "preferred configuration" are purely financial and administrative; Fibertech simply wants to avoid the potential cost and administrative hassle associated with siting its cumbersome equipment enclosures in the right-of-way. With respect to the allegations in the last sentence of paragraph 11, Duke Energy admits that some pole owners allow equipment enclosure attachments beneath the communications space but states that other pole owners—like Duke Energy—require that such equipment enclosures be pad/pedestal mounted in the right-of-way (off-pole).¹²

- 12. Duke Energy lacks knowledge or information sufficient to admit or deny whether or for what purposes Fibertech "requires access to utility owned and controlled poles" and therefore denies the allegations in paragraph 12.
- 13. Duke Energy admits that DEI's predecessor, PSI Energy, Inc., and Fibertech entered into a pole attachment agreement dated March 14, 2003, and further states that the pole attachment agreement speaks for itself. To the extent Fibertech contends that the quoted language in section 2.1 of the PSI Fibertech pole attachment agreement (defining as a "separate attachment" any "other appurtenance affixed to a pole not herein defined") contains some sort of implicit permission to attach the equipment at issue in this case to DEI's poles, Duke Energy denies the allegations.
- 14. Duke Energy lacks knowledge or information sufficient to admit or deny the allegations in paragraph 14 and therefore denies the allegations. To the extent paragraph 14

¹² Freeburn Decl. ¶16.

alleges that DEI, DEC and DEP require separate agreements to cover wireless antenna pole attachments, Duke Energy admits this allegation.

A. Fibertech's Inquiry Into Attachments on Duke Energy Poles in "Certified" States

15. Duke Energy admits that, prior to and separate from Fibertech's inquiry about small cell antenna attachments in Indiana, Fibertech had inquired about similar attachments on Duke Energy Ohio, Inc. ("DEO") poles in Ohio and Kentucky, and that Fibertech presumably was advised of DEO's standard requiring that third-party equipment boxes be pad/pedestal mounted in the right-of-way (off-pole).¹³ Duke Energy denies any remaining allegations in the first sentence of paragraph 15. With respect to the second sentence of paragraph 15, Duke Energy admits that Exhibit 2 to the November 5, 2014 Declaration of Natasha Ernst ("Ernst Declaration") is a true and correct copy of an email sent by Van Bryan to Natasha Ernst in connection with Fibertech's inquiry about pole top attachments in Ohio and Kentucky, but denies that Fibertech's allegations accurately characterize the content of that email. For example, Mr. Bryan's email does not say, as Fibertech alleges, "that Duke deemed the space below the lowest communications line to be a 'non-regulated' area." Mr. Bryan's email instead stated that Duke Energy's potential ownership of a pole mounted equipment box would be "a non-regulated installation" (which would be true even if the discussion related to poles in a state governed by the Commission's pole attachment rules because a piece of equipment owned by Duke Energy and affixed to a Duke Energy pole is not "pole attachment" within the meaning of the Pole

¹³ Freeburn Decl. ¶ 7.

Attachments Act, 47 U.S.C. § 224(a)(4)). Duke Energy admits the allegations in the third and fourth sentences of paragraph 15.

- 16. Duke Energy admits the allegations in paragraph 16.
- 17. Duke Energy admits that Fibertech, by letter dated April 2, 2014, requested an agreement to attach wireless facilities to distribution poles owned by DEI, and that Exhibit 3 to the Ernst Declaration is a true and correct copy of that request (which speaks for itself). Duke Energy denies any remaining allegations in paragraph 17.
- 18. With respect to the allegations in the first and second sentences of paragraph 18, Duke Energy admits that, on April 24, 2014, Scott Freeburn (on behalf of DEI) sent to Natasha Ernst (on behalf of Fibertech) Duke Energy's standards for wireless antenna attachments on both primary and secondary poles, 15 and that the standards limit such attachments to a single antenna per pole (as there is but one pole top per pole), but denies any remaining allegations. Duke Energy denies the allegations of the last sentence of paragraph 18. Though Duke Energy's wireless attachment standards require that some equipment be pad/pedestal mounted in the right-of-way (as shown on the standards), both standards specifically permit attachment of "the antenna, the cable feeding the antenna and the cable feeding the amplifier in the pedestal to the pole." 16
- 19. Duke Energy admits that Scott Freeburn's April 24, 2014 email identified two separate standards available at that time (referred to in the email as "Standard 1 and Standard

¹⁴ 47 U.S.C. § 224(a)(4) ("[t]he term pole attachment means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility")(emphasis added).

¹⁵ See Exh. 4 to the Ernst Decl., email from Scott Freeburn, Joint Use and Tower Leasing Manager, Duke Energy, to Natasha Ernst, Fibertech (April 24, 2014) ("Exh. 4 to Ernst Decl.").

¹⁶ See Attachment 1 to Freeburn Decl., MW1 and MW3 Standards at Note 2 ("Attachment 1 to Freeburn Decl.").

2"), and further admits that Fibertech accurately quotes limited portions of that email, but denies any remaining allegations in paragraph 19.¹⁷ Duke Energy later withdrew the second standard (under which Duke Energy would own a pole-mounted equipment box, a/k/a "Standard 2") prior to Fibertech or any other third-party requesting access under that standard.¹⁸ As early as August 20, 2014, Duke Energy advised Fibertech in writing: "Though DEI has not yet made the decision to withdraw its offer to install and own pole-mounted equipment cabinets, it appears DEI may be heading in that direction." Duke Energy confirmed the withdrawal of "Standard 2" in writing on October 8, 2014:

Our effort to think creatively around these issues has thus far invited more problems than solution. For this reason, as foretold in my August 20, 2014 email, DEI is no longer offering the option under which a third-party collocates equipment in a DEI-owned pole mounted enclosure.²⁰

- 20. Duke Energy admits that paragraph 20 accurately quotes a portion of Scott Freeburn's April 24, 2014 email, but denies any remaining allegations, express or implied.
- 21. To the extent paragraph 21 alleges that Duke Energy's standards require that certain ancillary equipment (like cabinets, amplifiers, meter bases and disconnect switches) be pad/pedestal mounted in the right-of-way, Duke Energy admits those allegations. Further, to the extent paragraph 21 alleges that, for a brief period of time, Duke Energy's standards permitted collocation of certain equipment within a Duke Energy-owned pole mounted enclosure, Duke Energy admits those allegations. Duke Energy denies any remaining allegations in paragraph 21.

 $^{^{17}}$ See Exh. 4 to the Ernst Decl. ¶3.

¹⁸ Sipes Decl. ¶9.

¹⁹ See Exh. 7 to Ernst Decl. ¶4, email from Karol Mack to Natasha Ernst (Aug. 20, 2014).

 $^{^{20}}$ See Exh. 11 to Ernst Decl. $\P 3$, email from Karol Mack to Natasha Ernst (October 8, 2014).

22. Duke Energy denies the allegations in the first and second sentences of paragraph 22 for at least two reasons. First, Fibertech's allegations fundamentally misrepresent (or reflect a misunderstanding of) the short-lived "Standard 2." Under Standard 2, Duke Energy—not a third-party lessee—would have owned the facilities.²¹ Second, the \$1,800/pole/year was a *proposed* price (subject to negotiation) that covered installation and lease of the equipment with no separate charge for the pole top antenna attachment.²² As Duke Energy explained in its July 21, 2014 letter to Fibertech:

In any event, the pricing model associated with the MW2 and MW4 standards is a *proposed* pricing model. If Fibertech's experience with the ownership and maintenance costs of similar equipment cabinets is vastly different than our proposed model, we are open to discussing the precise price point with you.²³

With respect to the third sentence of paragraph 22, Duke Energy admits that Scott Freeburn's April 24, 2014 email identified a proposed "monthly fee of \$150/pole" in connection with Standard 2, and further admits that the Master Distribution Wireless Equipment Lease Agreement sent by Van Bryan to Natasha Ernst on January 27, 2014 in connection with Fibertech's request for an agreement to cover poles in Ohio and Kentucky identified a proposed annual rent of \$3,000/pole, but Duke Energy denies any remaining allegations. Duke Energy denies the allegations in the final sentence of paragraph 22 for at least two reasons. First, the Master Distribution Wireless Equipment Lease Agreement referenced in paragraph 22 was transmitted by Duke Energy to Fibertech in connection with Fibertech's request for an agreement to cover poles in Ohio and Kentucky (not Indiana or North Carolina). Second, despite what Fibertech may have inferred from the January 2014 transmittal of the Master Distribution

²¹ See Exh. 4 to Ernst Decl. ¶3; see also Freeburn Decl. ¶12.

²² *Id.*; Freeburn Decl. ¶12.

²³ See Letter from Karol Mack to Natasha Ernst (July 21, 2014), attached hereto as Appendix A (emphasis added).

Wireless Equipment Lease Agreement to cover poles in Ohio and Kentucky, Scott Freeburn's April 24, 2014 email made it clear that with respect to a similar arrangement in DEI's service territory under Standard 2, DEI's starting point for the discussions relating to price was "a monthly fee of \$150/pole." Fibertech itself references these exact words in paragraph 19 of its complaint, and indirectly references the same "starting point" in paragraph 22. What is more puzzling, though, is Fibertech's fixation on the price point of a standard that Fibertech was *never* interested in pursuing, and that DEI (and all of Duke Energy's operating companies) have withdrawn. Fibertech does not take exception to the price point proposed by Duke Energy in connection with Standard 1– the only remaining standard for small cell antenna attachments.²⁵

B. The May 22, 2014 Meeting

23. With respect to the allegations in the first sentence of paragraph 23, Duke Energy admits that Natasha Ernst, Eric Finnmore and Dave MacDonald met with Scott Freeburn in Cincinnati, Ohio on May 22, 2014, and that the purported purpose of the meeting was to discuss Duke Energy's standards, but Duke Energy denies any remaining allegations. As it turned out, the meeting was less about "the reasons for Duke's policy" and more about Fibertech's rigid demands to be accommodated according to its own preferences, notwithstanding "Duke's policy." With respect to the allegations in the second sentence of paragraph 23, Duke Energy admits that Fibertech explained during the May 22, 2014 meeting how it had attached similar equipment to utility poles in a manner compliant with the NESC elsewhere, but denies any

²⁴ See Exh. 4 to Ernst Decl. ¶3.

²⁵ Freeburn Decl. ¶13.

²⁶ Freeburn Decl. ¶14.

remaining allegations. In any event, the NESC is a safety code–not a construction standard–and is widely adopted as a minimum standard, including in Indiana.²⁷ The NESC itself states:

The purpose of these rules is the practical safeguarding of persons during installation, operation, or maintenance of electric supply and communication lines and associated equipment. These rules contain the basic provisions that are considered necessary for the safety of employees and the public under specified conditions. This Code is not intended as a design specification or as an instruction manual.²⁸

- 24. Duke Energy admits that, during the May 22, 2014 meeting, Fibertech indicated that it could attach its own equipment in a manner similar to standards MW2 and MW4, with the critical dissimilarity being that Fibertech—not DEI—would own the equipment, but denies any remaining allegations in paragraph 24. The entire premise of standards MW2 and MW4 was Duke Energy ownership of the facilities.²⁹ The only circumstance under which Duke Energy was willing to entertain pole-mounted cabinets and other pole-mounted enclosures (other than extraordinary circumstances such as where a municipality prohibited pad/pedestal mounted equipment in the right-of-way) was if the facilities were owned and completely controlled by Duke Energy.³⁰
- 25. Duke Energy admits that, during the May 22, 2014 meeting, Fibertech provided drawings and other specifications purportedly approved by Dayton Power & Light Company and

²⁷ See 170 Ind. Admin. Code 4-1-26 ("In all cases not covered by specific statutes in effect, Part 2...and Part 3... of the 2002 edition of the National Electrical Safety Code, are prescribed for overhead and underground construction practice commenced after the date of promulgation of this section").

²⁸ See National Electrical Safety Code, C2-200, Section 1.010 Purpose; see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499, ¶1147 (Adopted Aug. 1, 1996)(recognizing that NESC "is not intended as a design specification or an instruction manual" and also recognizing that "utilities typically impose requirements more stringent than those prescribed by NESC and other industry codes").

²⁹ Freeburn Decl. ¶15; see also Sipes Decl. ¶11.

³⁰ Freeburn Decl. ¶15.

an American Electric Power Corp. operating company, and that Fibertech further represented that it had installed similar equipment in other markets, but Duke Energy denies any remaining allegations in paragraph 25. Fibertech's position, both in its pre-complaint dealings with Duke Energy and in its complaint, is as follows: if anybody allows it, everybody should allow it. This "lowest common denominator" approach is not only wrong as a matter of a pole owner's section 224(f) rights, but also flies in the face of the Commission's longstanding recognition that individual utilities each have their own individual standards. For example, the Commission stated:

In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise. A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions . . . As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences. ³¹

Duke Energy lacks knowledge or information sufficient to admit or deny whether installation of pole-mounted telecommunications equipment (such as equipment cabinets, amplifiers, power supplies, and meter bases) beneath the communications space is "common" or "well-established" and therefore denies that allegation. To the extent paragraph 26 alleges that such equipment has been safely installed on utility poles beneath the communications space, Duke Energy does not dispute that other utilities may indeed view this as a safe and acceptable practice. But to the extent Fibertech is alleging that, because another utility allows such installations there is no lawful basis for Duke Energy to restrict similar installations, Duke

³¹ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499, ¶1148 (Adopted Aug. 1, 1996).

Energy denies the allegations and states that this "lowest common denominator" approach to pole attachment policy is neither sound logic nor sound engineering. Moreover, the safe installation of ancillary equipment on pedestals in the right-of-way is perhaps more common and more well-established than pole-mounted equipment, particularly over the course of the past twenty years. For example, upon information and belief, Indianapolis Power and Light, which serves territory adjacent to DEI's, also requires that all ancillary wireless telecommunications equipment be pad-mounted on a pedestal. Duke Energy denies any remaining allegations in paragraph 26.

27. Duke Energy admits that Fibertech took the position during the May 22, 2014 meeting that some cities "want" Fibertech to place its equipment on existing poles rather than in the right-of-way, but denies any remaining allegations or implications in paragraph 27 (including but not limited to the truth of the matter asserted). Fibertech (despite inquiry) never identified which cities it was referencing.³⁴ And when asked whether any cities actually prohibited equipment in the right-of-way, Fibertech's response was only that such an inquiry was either "irrelevant" or "missed the point." Fibertech's CTA in Indiana gives Fibertech broad authority "to utilize public rights-of-way for its telecommunications facilities and services" so Fibertech undoubtedly has the legal authority to comply with Duke Energy's standards. But, in any event, on at least two separate occasions Duke Energy advised Fibertech in writing that it would

 $^{^{32}}$ Declaration of Timothy Robeson ¶17 (Dec. 17, 2014) ("Robeson Decl.") Attached hereto at Appendix E.

³³ Freeburn Decl. ¶16.

³⁴ Freeburn Decl. ¶18; *see also* Fibertech's Complaint ¶27.

³⁵ Freeburn Decl. ¶18.

³⁶ See Exh. 12 to Ernst. Decl. at 9.

consider exceptions to the standard if it served as an actual barrier to deployment. As early as February 5, 2014, Duke Energy wrote:

Locating equipment on a pedestal has not served as a barrier to deployment for other companies, but if Fibertech runs into a situation where it is not allowed to put its equipment on a pedestal (for example, if the city or a landowner prohibits it) we will work with Fibertech on a solution.³⁷

Similarly, on October 8, 2014, Duke Energy wrote:

Though DEI's operating presumption (based on DEI's standards) will be to disallow pole-mounted equipment enclosures, DEI will consider each request on its own merits. Those merits may include any extenuating circumstances, such as a municipal ordinance prohibiting placement of equipment in the right of way.³⁸

28. Duke Energy denies the allegations in the first sentence of paragraph 28, as stated. In the May 22, 2014 meeting, DEI made clear its preference that Fibertech place its cumbersome ancillary equipment on a pad or pedestal in the right-of-way, but that if Fibertech viewed collocation of such equipment within a pole-mounted equipment box as preferable, it could do so within a DEI-owned equipment box.³⁹ This was an arrangement that another carrier had urged Duke Energy to consider the previous year, and that Duke Energy had reluctantly agreed to pursue in an effort to foster cooperation and promote small cell deployment while at the same time managing Duke Energy's concerns relating to the safety, design, work practice impact and control over such installations.⁴⁰ Duke Energy denies the allegations in the second sentence of paragraph 28. Though the starting point for an agreement would have been similar to the Master Distribution Wireless Equipment Agreement sent to Fibertech in January 2014 in connection with Fibertech's interest in small cell deployment in Ohio and Kentucky, the parties never

³⁷ *See* Email from Scott Freeburn, Duke Energy, to Natasha Ernst, Fibertech (February 5, 2014), Attached hereto as Appendix B.

³⁸ See Exh. 11 to Ernst Decl., email from Karol Mack to Natasha Ernst (Oct. 8, 2014).

³⁹ Freeburn Decl. ¶16.

⁴⁰ Freeburn Decl. ¶10.

advanced from square one because Fibertech was *never* interested in pursuing this option. In fact, from Duke Energy's perspective, Fibertech's only interest in this arrangement was finding a way to use it against Duke Energy.⁴¹ This experience has made Duke Energy—an electric utility with one of the largest footprints in the country—reluctant to think "outside the box" or beyond its standards in an effort to accommodate the evolving preferences of third-party attachers.⁴²

C. Duke Energy's Non-Discriminatory Standards

29. Duke Energy denies the allegations in paragraph 29. Fibertech is conflating a *standard* for access with a *denial* of access. And while it is true that every standard for access (whether from the NESC, other applicable codes, or individual utility specifications) serves as some sort of limitation on particular installations or configurations, this does not mean that those standards constitute a "blanket rejection." If it did, this would mean that *no* standard (whether from the NESC, other applicable codes, or individual utility specifications) was viable. Clearly, this is not the case, as the Commission has long acknowledged. Moreover, Fibertech appears to be seeking a pole-by-pole justification for the standard when it has not yet submitted a single application *anywhere* in Duke Energy's service areas. How in the world is Duke Energy supposed to provide a pole-by-pole justification for an alleged denial of access when Fibertech has not even sought access to any particular pole? Even if Fibertech's substantive concerns were legitimate—and they are not—its procedural posture is fatal to its access complaint.

⁴¹ Freeburn Decl. ¶17.

 $^{^{42}}$ Freeburn Decl. ¶17; see also Sipes Decl. ¶12.

⁴³ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499, ¶1148 (Adopted Aug. 1, 1996).

⁴⁴ Freeburn Decl. ¶24 *see also* Exh. 11 to Ernst Decl. at ¶8, email from Karol Mack to Natasha Ernst (Oct. 8, 2014).

- 30. Duke Energy admits the allegations in paragraph 30 insofar as they relate to the pre-merger practices of DEI and DEC, but denies the allegations insofar as they relate to DEP or the post-merger practices of DEI and DEC. Duke Energy Corporation and Progress Energy, Inc. finalized their merger in July 2012.⁴⁵ As part of the merger integration process, the distribution standards teams from both companies gave careful attention to developing consistent, enterprisewide standards. 46 At that time, Progress Energy, Inc. (the entity now known as DEP) had a decades-old standard that required certain ancillary telecom equipment be pad/pedestal mounted in the right-of-way. 47 The pre-merger Duke Energy Corporation companies (which were themselves the result of several mergers) had taken more of an ad hoc approach to the same issue, but without a specific standard requiring that such equipment be pad/pedestal mounted in the right-of-way. 48 The distribution standards integration team sought field input from both companies, and ultimately decided that the best practice for the combined companies was the longstanding Progress Energy, Inc. standard.⁴⁹ This standard was not specific to wireless antenna attachments--it applied to similar equipment ancillary to all attachments. 50 As of the date of the merger, the Progress Energy, Inc. standard became the standard for the combined companies.⁵¹
- 31. Duke Energy admits that other utilities—and even some of the legacy Duke Energy operating companies prior to the merger referenced in paragraph 30 above—have

⁴⁵ Robeson Decl. ¶6.

⁴⁶ *Id*.

⁴⁷ Robeson Decl. ¶7.

⁴⁸ *Id*.

⁴⁹ *Id*.

⁵⁰ Robeson Dec. ¶6.

⁵¹ Robeson Decl. ¶8.

allowed installation of equipment beneath the communications space in a manner consistent with the NESC, but denies any remaining allegations in paragraph 31. Small cell and other wireless antennas also have been successfully deployed in many places with pad/pedestal mounted equipment in the right-of-way in a manner consistent with Duke Energy's standards.⁵² Whether an installation can be made consistent with the NESC does not address the separate question of which method is appropriate when there are multiple methods that are consistent with the NESC. For example, installation of ancillary communications equipment on a pad or pedestal in the right-of-way is also consistent with the NESC.⁵³

32. Duke Energy lacks knowledge or information sufficient to admit or deny whether some (unidentified) other utility pole owners in Indiana allow the installation of the equipment at issue here beneath the communications space on their poles, and therefore denies the allegations in paragraph 32. To the extent the practices of other nearby electric utility pole owners are relevant to the analysis, upon information and belief, Indianapolis Power & Light Company (whose service area is contiguous to DEI's service area), requires that equipment cabinets, amplifiers, power supplies, and meter bases be located off-pole in the right-of-way.⁵⁴

D. Executive Level Discussions Between DEI and Fibertech

33. Duke Energy admits that, by letter dated June 13, 2014, Fibertech requested an executive-level meeting "with Duke Energy ('Duke') in the State of Indiana" pursuant to 47 CFR § 1.1404(k) (improperly described as "47 C.F.R. § 1404(k)" in the June 13, 2014 letter and improperly described as "47 CFR § 1.140(k)" in paragraph 33 of the complaint). Duke Energy denies any remaining allegations in paragraph 33, because the requested meeting was with

⁵² Freeburn Decl. ¶16.

⁵³ Robeson Decl. ¶10.

⁵⁴ Freeburn Decl. ¶16.

"Duke Energy...in the State of Indiana" (a/k/a DEI)—not "Duke" as Fibertech uses that term collectively to describe DEI, DEC and DEP in the complaint. This is not a mere technicality. Duke Energy noted in its October 8, 2014 email to Fibertech:

By way of example, during our meeting regarding Fibertech's potential deployment in DEI's territory, you met with Russ Atkins, Vice President of Design Engineering and Construction Planning – Midwest. Elsewhere, different executives would be involved in the decision-making.⁵⁵

34. With respect to the first sentence of paragraph 34, Duke Energy admits that an executive-level meeting was held at DEI's headquarters in Plainfield, Indiana on August 4, 2014 and that the people identified in paragraph 34 were in attendance. Duke Energy denies that the Duke Energy personnel were in attendance "on behalf of Duke" (used collectively in Fibertech's complaint to refer to DEI, DEC and DEP) because Scott Freeburn, Karol Mack, Robert Sipes, Russ Atkins and Eric Langley attended on behalf of DEI—not DEC or DEP.⁵⁶ Though some of the same personnel would have staffed a similar meeting on behalf of DEC and DEP, at least one critical team member would have been different.⁵⁷ Russ Atkins's responsibility is tied to Indiana and the Midwest, but not to the Carolinas.⁵⁸ Moreover, a request for an executive-level meeting with DEC or DEP would have been premature at that point because it was not until mid-July, 2014 that Fibertech even requested an agreement to attach wireless equipment to DEC's or DEP's poles.⁵⁹ DEP provided a wireless agreement to Fibertech on June 25, 2014 and DEC

 $^{^{55}}$ See Exh. 11 to Ernst Decl. $\P\P7-8$, email from Karol Mack to Natasha Ernst (October 8, 2014).

⁵⁶ Freeburn Decl. ¶20.

⁵⁷ *Id*.

⁵⁸ *Id.*

⁵⁹ Freeburn Decl. ¶23.

provided a wireless agreement to Fibertech on July 30, 2014.⁶⁰ Fibertech did not respond to either wireless agreement in any way until September 25, 2015 after the August 4, 2014 meeting.⁶¹ With respect to the allegations in the second sentence of paragraph 34, Duke Energy admits that the information provided by Fibertech might fairly be characterized as "responding to Duke's policy" but Duke Energy denies that Fibertech demonstrated that its preferred configuration "would not interfere with capacity, reliability, or engineering." Moreover, to the extent that Fibertech attempts to argue in its complaint the relevance of any potential agreements with DEP and/or DEC in regard to the August 4, 2014 meeting (and or any matters related thereto) such an argument would lack merit—all substantive communications regarding any attachment agreement between Fibertech and DEP and/or DEC took place after the August 4, 2014 meeting.⁶² Duke Energy admits the allegations in the final sentence of paragraph 34 (that DEI and Fibertech "were unable to resolve their differences" at the August 4, 2014 meeting).

35. With respect to the allegations in the first and second sentences of paragraph 35, Duke Energy admits that Fibertech stated at the August 4, 2014 meeting that its preferred equipment could not be placed inside an equipment box/cabinet due to heat dissipation and that placing its preferred equipment inside a box/cabinet would void manufacturer warnings, but Duke Energy does not know whether those statements were accurate or not. For purposes of the meeting, DEI accepted the truth of those representations (although, oddly enough, Fibertech does not attest to their truth in its complaint—only that the representations were made), and inquired as to whether there were other suitable pieces of equipment available in the marketplace that

 $^{^{60}}$ Id

⁶¹ See Exh. 10 to Ernst Decl., email from Natasha Ernst to Karol Mack (Sept. 25, 2014).

⁶² Freeburn Decl. ¶23.

could be placed inside an equipment box/cabinet.⁶³ Fibertech, for reasons that were not clear to DEI at the time (and remain unclear), refused to even entertain this inquiry.⁶⁴ So, in essence, Fibertech was insisting that DEI conform to Fibertech's preferred equipment selection and installation configuration rather than vice versa. And this was all despite the fact—as Fibertech appears to concede—that DEI's standards would *not* serve as a deployment barrier.

With respect to the allegations in the third and fourth (final) sentences of paragraph 35, Duke Energy admits the parties discussed a "bracket idea" at the August 4, 2014 meeting and further discussed the need for continued discussions regarding the financial consideration under such an idea, but denies any remaining allegations. An important fact omitted from Fibertech's description of the August 4, 2014 meeting was that the parties agreed that all communications in the meeting would be treated as confidential, protected settlement communications.⁶⁵ Though Duke Energy did not expect that the *fact* of the meeting; or the fact that no resolution was reached at the meeting, would be protected, Duke energy *did* expect that the "bracket idea" would be subject to protection.⁶⁶ Otherwise, Duke Energy would have rejected the idea as hopeless from the outset.⁶⁷ Fibertech itself even subsequently characterized the "bracket idea" as a "settlement proposal"⁶⁸ as if to highlight its blatant disregard for the settlement confidentiality agreement reached at the outset of the August 4, 2014 meeting. Fibertech's disregard of the confidentiality agreement, in conjunction with its exploitation of the erstwhile alternative attachment standard, and its efforts to prematurely "ripen" the issues with respect to DEP and

⁶³ Freeburn Decl. ¶21.

⁶⁴ *Id*.

⁶⁵ *Id*.

⁶⁶ *Id*.

 $^{^{67}}$ Id

 $^{^{68}}$ See Exh. 10 to Ernst. Decl. ¶1, email from Ernst to Mack (Sept. 25, 2014).

DEC, make the entire pre-complaint discussion with Fibertech seem like a set-up and a waste of time.

E. Discussions Following the August 4, 2014 Meeting

36. Duke Energy admits that, after the August 4, 2014 meeting, Fibertech sent an example of a bracket on which it could mount its power supply, amplifier, meter base and other equipment, Duke Energy further admits that, by August 20, 2014 email, DEI stated:

One of DEI's action items from the meeting was to consider the idea Charles raised about DEI owning a pole-mounted bracket onto which Fibertech could collocate its equipment enclosures. After careful consideration by our engineering and standards groups, we do not believe this is a viable option. ⁶⁹

Duke Energy denies any remaining allegations in paragraph 36, including but not limited to whatever Fibertech implies by placing the word "own" in quotation marks. One of the philosophical divides between the parties was over the issue of who could or should own certain types of facilities. Fibertech treated the ownership distinction as an immaterial nuisance; DEI treated it as fundamentally tied to questions of safety, reliability and engineering.

37. Duke Energy admits that, on August 20, 2014, DEC and DEP transmitted proposed wireless telecom agreements to Fibertech, but denies any remaining allegations in the first sentence of paragraph 37. With respect to the allegations in the second sentence of paragraph 37, Duke Energy admits that the DEC and DEP wireless telecom agreements likely were similar to other agreements Fibertech had seen from other Duke Energy operating companies, and further admits that Fibertech accurately quotes the definitions of "Attachment" in the two referenced agreements. Duke Energy denies any remaining allegations in the second sentence of paragraph 37. Duke Energy also denies the allegations in the third sentence of paragraph 37 for at least three reasons. First, Duke Energy's *standards*—not the language in the

⁶⁹ See Exh. 7 to Ernst Decl. ¶2, email from Karol Mack to Natasha Ernst (Aug. 20, 2014).

definitions section of a template agreement—control the types of equipment that can be attached to Duke Energy's poles. Second, as referenced above in paragraph 18, there has not been an "elimination of third party equipment attachments." In addition to the antenna itself, Duke Energy's standards also specifically permit the attachment of "the cable feeding the antenna and the cable feeding the amplifier in the pedestal." Third, the language quoted by Fibertech from the definitions section of the agreements says nothing of "Duke-owned equipment attachments"—the language in these agreements addresses *third-party* attachments. Duke Energy admits the allegations in final sentence of paragraph 37 insofar as they relate to the pre-merger practices of DEI and DEC, but denies the allegations insofar as they relate to DEP or the post-merger practices of DEI and DEC.

38. Duke Energy denies the allegations in paragraph 38. The mere fact that Duke Energy allows itself to affix certain equipment to its poles does not mean third-parties should be allowed to do the same. This is especially true where, as here, Duke Energy's short-lived willingness to allow such equipment affixations had nothing to do with competitive telecommunications purposes and everything to do with facilitating a preference expressed by some of its third-party attachers. Further, the notion that Duke Energy's ownership of a particular type of attachment means that third parties should be able to make the same type of attachment, falls apart when taken to its extreme: nobody would contend that Fibertech should be able to own energized distribution lines attached to any Duke Energy pole, even though Duke

⁷⁰ Robeson Decl. ¶9.

⁷¹ See Attachment 1 to Freeburn Decl.

⁷² See Complaint ¶37; Exh. 8 to Ernst Decl. ¶1.5, Wireless Telecommunication Pole Attachment License Agreement; Exh. 9 to Ernst Decl. ¶1.5, Wireless Telecommunication Pole Attachment License Agreement.

⁷³ *See* ¶30 above.

Energy owns energized distribution lines on all of its poles. Ownership of facilities, therefore, *does* matter (despite Fibertech's treatment of this issue as an immaterial nuisance). But in any event, the standard under which Duke Energy could own pole-mounted equipment enclosures has been withdrawn. In other words, Duke Energy does not allow itself to affix these types of equipment enclosures to its poles.

F. Fibertech Attempts to End Run the Commission's Executive-Level Meeting Rule with Respect to DEP and DEC.

39. With respect to the allegations in the first sentence of paragraph 39, Duke Energy admits that, by email dated September 25, 2014, Fibertech attempted to end-run the Commission's executive-level meeting rule (47 CFR § 1.1404(k)) as to DEC and DEP. Fibertech wrote:

In addition, based on communication from Duke representatives regarding pole access in other Duke states, including but not limited to Ohio, North Carolina, and Kentucky, Fibertech understands that Duke's demands regarding access to unusable space for all of its states are the same as have been articulated for Indiana ⁷⁴

Duke Energy responded to this particular point via October 8, 2014 email:

Duke affiliates in Ohio, North Carolina and Kentucky have similar standards for the attachment of wireless antennas, but the outcome of any specific request for access may vary depending on the jurisdiction (and, of course, the specific merits of a particular request for access). By way of example, during our meeting regarding Fibertech's potential deployment in DEI's territory, you met with Russ Atkins, Vice President of Design Engineering and Construction Planning – Midwest. Elsewhere, different executives would be involved in the decision-making. The ultimate decisions on any business issue are inherently local, even if the decision-making begins with standards and policies similar to those in other jurisdictions. To that end, we believe it is an overgeneralization to state that "the demands regarding access to unusable space for all of [Duke Energy's] states are the same as have been articulated for Indiana." Moreover, we believe this

⁷⁴ See Exh. 10 to Ernst Decl., email from Natasha Ernst to Karol Mack (Sept. 25, 2014).

approach would be at odds with the federal regulatory obligation to evaluate each specific request on its own merits.⁷⁵

Duke Energy denies any remaining allegations in the first sentence of paragraph 39.

Duke Energy denies the allegations in the second sentence of paragraph 39 for two reasons. First, by late August 2014, DEI already had communicated to Fibertech that it was likely going to withdraw the DEI-owned equipment cabinet collocation proposal:

This renewed focus on the issues surrounding pole-mounted fixtures beneath the communications space has also led to a reevaluation of DEI's original proposals. Though DEI has not yet made the decision to withdraw its offer to install and own pole-mounted equipment cabinets, it appears DEI may be headed in that direction.⁷⁶

Second, under that short-lived proposal, Fibertech would not have "ceded" ownership to DEI; DEI would have owned the restricted equipment from the outset. Duke Energy admits the allegations in the third sentence of paragraph 39 but only subject to the explanation set forth in paragraph 22 above (regarding proposed price points). Duke Energy denies the allegations in the final sentence of paragraph 39 including but not limited to whatever Fibertech implies by placing the word "Duke's" in quotation marks. Fibertech *was* (and still is) allowed to attach its "antenna, the cable feeding the antenna and the cable feeding the amplifier in the pedestal" directly to the pole. The allegation that "Duke sought to charge Fibertech far in excess of the lawful regulated rate" is premature at best because the parties never reached the question of price point. As set forth in paragraph 22 above, DEI specifically invited further conversation about the appropriate

 $^{^{75}}$ See Exh. 11 to Ernst Decl. $\P 7$, email from Karol Mack to Natasha Ernst (October 8, 2014).

 $^{^{76}}$ See Exh. 7 to Ernst Decl. \P 4, email from Karol Mack to Natasha Ernst (Aug. 20, 2014).

⁷⁷ See Exh. 4 to Ernst Decl. ¶3; Freeburn Decl. ¶12.

⁷⁸ See Attachment 1 to Freeburn Decl.; see also Freeburn Decl. ¶9; Robeson Decl. ¶9.

rate structure but Fibertech never accepted the invitation.⁷⁹ From Duke Energy's perspective, Fibertech was more concerned at that time with posturing for an eventual pole attachment complaint than it was exploring legitimate deployment options and pricing model.⁸⁰ That impression was validated by Fibertech's post-executive level meeting correspondence in which Fibertech attempted to ripen disputes as to DEC and DEP that had not even been planted.⁸¹ In any event, Fibertech's complaints relating to the proposed price point under "Standard 2" are a non-starter because "Standard 2" is no longer available.⁸²

40. Duke Energy admits the allegations in paragraph 40.

G. Fibertech Attempts to manufacture an Access "Denial" Without Ever Submitting an Application

41. Duke Energy admits that Karol Mack's October 8, 2014 email stated:

DEI will evaluate any specific requests for access submitted by Fibertech. Though DEI's operating presumption (based on DEI's standards) will be to disallow polemounted equipment enclosures, DEI will consider each requests on its own merits. 83

Duke Energy denies that the October 8, 2014 email stated "that Duke lacks detailed information on Fibertech's proposed installation." DEI *did* state in the October 8, 2014 email that Fibertech was in a superior position to propose potentially suitable alternative configurations or arrangements:

Fibertech, we believe, has a good understanding of DEI's standards and limitations. The reverse is not necessarily true. While DEI can evaluate any

⁷⁹ See ¶22.

⁸⁰ Freeburn Decl. ¶¶21-22.

 $^{^{81}}$ See Exh. 10 to Ernst Declaration ¶1, email from Natasha Ernst to Karol Mack (Sept. 25, 2014).

 $^{^{82}}$ Freeburn Decl. $\P 11;\ \textit{see also}$ Sipes Decl. $\P 9.$

 $^{^{83}}$ See Exh. 11 to Ernst Declaration ¶5, email from Karol Mack to Natasha Ernst (October 8, 2014).

specific equipment configuration proposed by Fibertech, DEI does not have a deep enough understanding of the technology used by Fibertech—or the technology available to Fibertech—to propose potentially suitable alternative configurations or arrangements.⁸⁴

Duke Energy denies any remaining allegations in the first sentence of paragraph 41.

Duke Energy denies the allegations in the second sentence of paragraph 41. The fact that Fibertech has never submitted an application to attach to any specific pole in any of Duke Energy's service areas does moot Fibertech's complaint insofar as the complaint is framed as a denial of access pursuant to section 224(f) of the Pole Attachments Act. There has not been a denial of access; there is only a standard that Fibertech dislikes. Duke Energy denies the allegations in the third sentence of paragraph 41 as stated because DEI had not forgotten about the information Fibertech references. Fibertech was either being obtuse or playing dumb—the issue was not whether DEI understood Fibertech's preferred configuration; the issue was whether there was another configuration that would suit Fibertech's needs (versus its preferences) while at the same time satisfying DEI's standards. With respect to the allegations in the fourth sentence of paragraph 41, Duke Energy admits that it has been consistent and clear in its explanation of its standards, but denies any remaining allegations. Duke Energy lacks knowledge or information sufficient to admit or deny whether submitting an actual application for attachment "would be pointless" because Duke Energy cannot foretell where the application would be submitted, what the application would propose, whether there would be extenuating circumstances justifying a departure from the standards, or any of the other myriad factors that are attendant to an actual (as opposed to a hypothetical) application. Fibertech is attempting to frame this dispute as a denial of access, when the real issue is whether Fibertech's deployment

⁸⁴ *Id*.

preferences (as opposed to its deployment needs) should be elevated over Duke Energy's distribution systems standards.

- 42. Duke Energy admits that the first sentence of paragraph 42 accurately quotes a portion of Karol Mack's October 8, 2014 email to Natasha Ernst, but denies any remaining allegations. Duke Energy denies the allegations in the second sentence of paragraph 42. Duke Energy's standards specifically facilitate small cell deployment; the standards merely restrict the type of ancillary equipment that can be pole-mounted beneath the communications space. Duke Energy denies the allegations in the third sentence of paragraph 42. Fibertech's allegations in the third sentence of paragraph 42 reflect one of two troubling realities: either (a) Fibertech is surprisingly naive regarding the cumulative effect of *any* practice on an electric distribution system; or (b) Fibertech is trying to deliberately steer the Commission into a treacherous policy ditch. Distribution standards reflect not only pole-by pole considerations, but also must account for the cumulative effect that any practice has on Duke Energy's utility pole infrastructure as a whole, and unlike Fibertech, Duke Energy cannot afford to focus only on a sub-set of poles. The control of the cumulative effect that any practice has on Duke Energy's utility pole infrastructure as a whole, and unlike Fibertech, Duke Energy cannot afford to focus only on a
- 43. Duke Energy denies the allegations in paragraph 43. The parties may have been talking past each other in connection with the issue of whether Fibertech's installations were likely to require a pole change out. When Duke Energy stated that "Fibertech's attachments will require a pole change-out in almost every instance" it was not speaking specifically about any ancillary equipment attachments; Duke Energy was talking about the antenna installation, which

⁸⁵ See Attachment 1 to Freeburn Decl.; Freeburn Decl. ¶9; Robeson Decl. ¶11.

⁸⁶ See Robeson Decl. ¶13.

⁸⁷ *Id.* ¶13-15; *see also* Sipes Decl. ¶14.

will require a pole change-out in almost every instance to obtain the necessary clearances.⁸⁸ The point Duke Energy was making is that it has no obligation to change-out poles to accommodate Fibertech (47 U.S.C. §224(f)(2)), but that it was agreeing to do so in an effort to accommodate Fibertech and facilitate small cell deployment.⁸⁹ In return for this accommodation, is it too much to ask that Fibertech follow Duke Energy's distribution standards?

44. Duke Energy denies the allegations in paragraph 44, and specifically denies the implication that Fibertech presented DEI with "viable alternatives." Fibertech presented none. 90

IV. DISCUSSION

- A. The Pole Attachment Laws Vest Considerable Discretion in the Pole Owner and Were Never Intended to Promote the "Lowest Common Denominator Approach" that Fibertech Promotes.
- 45. Duke Energy admits that section 224(f)(1) of the Act requires utilities to "provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it" and further admits that section 224(b)(1) of the Act grants the Commission authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." Duke Energy denies any remaining allegations in paragraph 45.
- 46. Duke Energy admits the allegations in paragraph 46, and states that, similarly, the Act's preservation of an electric utility's right to "deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes" was intended to ensure protection of electric

⁸⁸ Freeburn Decl. ¶9.

⁸⁹ *Id*.

⁹⁰ Freeburn Decl. ¶21.

distribution networks. As the Commission recently stated, "section 224 entrusts [electric utilities] with the responsible management of facilities that are both essential and potentially hazardous." Further, the Commission has correctly observed that "electric power companies are typically disinterested parties with only the best interest of the infrastructure at heart."

- 47. With respect to the allegations in the first sentence of paragraph 47, Duke Energy admits that access to utility poles in North Carolina lies within the Commission's jurisdiction and further admits that the Commission may have jurisdiction over certain relationships involving access to utility poles in Indiana, but denies any remaining allegations. As set forth above in paragraph 1, the IURC has jurisdiction to regulate pole attachment relationships between "public utilities" and DEI and Fibertech are both "public utilities" in Indiana. With respect to the allegations in the second sentence of paragraph 47, Duke Energy admits that Fibertech has accurately quoted portions of the order it purports to cite.
- 48. Duke Energy denies the allegations in the first and second sentences of paragraph 48 for a number of reasons. First, Duke Energy's standards are not a "blanket ban against appurtenant equipment" because the standards specifically allow certain types of ancillary equipment associated with small cell antennas ("the cable feeding the antenna and the cable feeding the amplifier in the pedestal"). Furthermore, Duke Energy's Standards facilitate wireless antenna deployment. In its June 13, 2014 letter requesting an executive-level meeting with DEI, Fibertech even stated that it "appreciates that Duke does not have 'blanket prohibitions

 $^{^{91}}$ See In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future, 25 F.C.C. Rcd. 11864, ¶67 (2010).

⁹² *Id.* at ¶68.

 $^{^{93}}$ See ¶1; Ind. Code §8-1-25.

⁹⁴ See Attachment 1 to Freeburn Decl.; Freeburn Decl. ¶9; Robeson Decl. ¶9.

⁹⁵ Freeburn Decl. ¶9.

on pole top access for wireless antennas." Second, Duke Energy's standards—which facilitate small cell deployment—are not a denial of access; they are standards. By Fibertech's logic *any* standard would serve as a "denial of access" because *all* standards serve as some sort of limitation or restriction on what can be attached to a pole (and where it can be attached). Third, it makes no sense for Fibertech to insist that Duke Energy justify its standard on a pole-by-pole basis where Fibertech has not made an application for any specific pole. 98

Duke Energy also denies the allegations in the final sentence of paragraph 48, even though it is not clear what "policy" Fibertech is referencing (or why it is referenced in quotation marks). Fibertech has never taken exception to the per pole rate proposed by DEI under the remaining standard ("Standard 1").⁹⁹ In fact, in its July 21, 2014 letter, DEI stated:

Second, as we understand your letter, Fibertech's concerns over Duke Energy's pricing models lay exclusively with the MW2 and MW4 standards. In other words, we do not interpret your letter as taking exception to the pricing model associated with the MW1 and MW3 standards. If our interpretation is incorrect, we trust that you will let us know.

Fibertech never advised DEI otherwise.¹⁰⁰ If Fibertech is actually referring to the pricing "policy" under the erstwhile standard, there are two reasons why this allegation is a nonstarter. First, there was never an impasse on the pricing negotiations because Fibertech never engaged in negotiations, despite invitation.¹⁰¹ Second, and perhaps more importantly, DEI has withdrawn

 $^{^{96}}$ Id.; see also Exh. 6 to Ernst Decl. $\P 7$, letter from Natasha Ernst to Karol Mack (June 21, 2014).

⁹⁷ Robeson Decl. ¶12.

⁹⁸ Freeburn Decl. ¶ 24.

⁹⁹ Freeburn Decl. ¶13.

¹⁰⁰ Freeburn Decl. ¶13.

¹⁰¹ *Id.*; *see also* ¶22 above.

the standard that carried with it the pricing proposal objectionable to Fibertech. Thus, any cry in this proceeding that the proposal was unjust or unreasonable is wasted breath. It is a nullity.

49. Duke Energy denies the allegations in the first sentence of paragraph 49. Fibertech always had the option of pursuing either "Standard 1" or "Standard 2", and DEI made clear its preference that Fibertech deploy under "Standard 1":

Duke Energy developed the MW2 and MW4 standards solely as an accommodation to wireless telecom carriers who prefer pole-mounted equipment cabinets. Duke Energy's original preference was (and remains) that all equipment cabinets be located in the public right of way, as reflected in the MW1 and MW3 standards. ¹⁰²

Duke Energy lacks knowledge or information sufficient to admit or deny the allegations in the second, third and fourth sentences of paragraph 49, and therefore denies the allegations. But even if the allegations are true, they have no bearing on the present case for two reasons. First, Fibertech's allegations in these sentences appear to be referencing a construct under which "lease back" was the only option offered to the cable operator. Here, Fibertech always had other options (namely, "Standard 1"). Second, Fibertech's allegations relate to a time when—until now—there there was no right of mandatory access. Mandatory access did not become a part of the Pole Attachments Act until 1996. Third, and most importantly, even if Duke Energy's erstwhile standard could be construed as a "lease back" arrangement, that standard has been withdrawn. Duke Energy never offered it as the only option, and Duke Energy no longer offers it at all. Duke Energy denies the allegations in the fifth sentence of paragraph 49 for the same reasons set forth in response to the allegations in the first through fourth sentences of paragraph 49. Duke Energy also denies the allegations in the first through fifth sentences of paragraph 49, and

 $^{^{102}}$ See Letter from Karol Mack to Natasha Ernst (July 21, 2014), attached hereto as Appendix A.

because the allegations in the final sentence are stated in the present tense when the standard Fibertech is complaining about is a thing of the past.

50. With respect to the allegations in the first, second and third sentences of paragraph 50, Duke Energy admits that "Section 224 and the Commission's rules create a right to attach" but denies the remaining allegations. Fibertech is postulating a rule that would invalidate *any* standards, whether industry-wide or utility-specific. The Commission has actually taken the exact opposite approach by recognizing that both industry-wide standards and a utility's individual standards will apply to the manner, means and method of attachment:

In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise. A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility and on local conditions . . . As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences. ¹⁰³

With respect to the allegations in the fourth and fifth sentences of paragraph 50, Duke Energy admits that a local government's position on whether it permits pad/pedestal mounted equipment in the right-of-way is not a basis for denial of access, but it may serve as a basis for DEI making an exception to its standard in order to facilitate small cell deployment. Duke Energy explained this to Fibertech on multiple occasions, including at least twice in writing. Duke Energy denies the remaining allegations in the fourth and fifth sentences of paragraph 50

¹⁰³ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499, ¶1148 (Adopted Aug. 1, 1996).

¹⁰⁴ Freeburn Decl. ¶5.

¹⁰⁵ See Exh. 10 to Ernst Declaration ¶5; see also Letter from Karol Mack to Natasha Ernst ¶7(July 21, 2014), attached hereto as Appendix A.

because Fibertech is drawing a false analogy between a threshold question of access (whether a CATV or telecom carrier can attach antennas and lines to a pole) and a secondary question of the standards by which such attachments are made (and by extension the required location of cumbersome ancillary equipment).

Duke Energy denies the allegations in the sixth sentence of paragraph 50. All construction standards serve as *some* limitation on attachment techniques, locations or types. ¹⁰⁶ For example, most utilities have standards that require 12" of separation between communications attachments. ¹⁰⁷ Similarly, most utilities require that communications attachments be bonded to the utility's grounding system. ¹⁰⁸ Under Fibertech's theory, these would be unlawful "blanket bans" on ungrounded attachments and attachments within 12" of another communications attachment, so either (a) these are not "blanket bans" and/or (b) they are not unlawful. Clearly, these are acceptable limitations. Duke Energy denies the allegations in the seventh and eighth (final) sentences of paragraph 50. The Commission has *never* "made clear" that any standard serving as a limitation of attachment techniques, locations or types, is unlawful. In fact, to the contrary, the Commission has explicitly stated that utilities may rely on industry codes, such as the NESC:

Nothing we propose alters the reliance utilities may place on the NESC and similar codes, or supplants or modifies regulations by FERC and OSHA. State and local requirements affecting pole attachments remain entitled to deference unless they are in direct conflict with a federal policy. Individual utilities will continue to make pole-by-pole determinations regarding capacity, safety, reliability, and generally applicable engineering purposes. ¹⁰⁹

¹⁰⁶ Robeson Decl. ¶12.

¹⁰⁷ *Id*.

 $^{^{108}}$ Id

¹⁰⁹ In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future, 25 F.C.C. Rcd. 11864, ¶24 (2010).

The Commission has also explicitly recognized that utilities have their own access standards.¹¹⁰ Moreover, in the 2011 Pole Attachments Order, the Commission singled out a specific type of "blanket ban"—those that prohibited pole top antenna attachments.¹¹¹ Duke Energy respectfully submits that the Commission intentionally avoided a broader statement regarding "blanket bans" because a broad statement would run afoul of the Commission's long-standing recognition of industry codes and individual utility standards. Further, even the Commission's prohibition against "blanket bans" on pole top antenna access presumably has limitations. For example, Duke Energy's standards do not allow "antenna on equipment poles such as capacitor banks, reclosers, switches, U.G. [underground] dip, etc." and Fibertech apparently does not object to such limitations.¹¹²

51. Duke Energy denies the allegations in the first, second and third sentences of paragraph 51. Duke Energy is not contending that its standards are never subject to regulatory scrutiny. Duke Energy's point was this: where Fibertech's objections are based on mere *preferences* (as opposed to needs), Fibertech (or another similarly situated third-party attacher) is unlikely to prevail in the balancing of interests that comes with regulatory review, especially when those preferences are at odds with a utility's non-discriminatory policies in an area where the utility is given considerable engineering discretion. Though the words "safety, reliability

¹¹⁰ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499, ¶1148 (Adopted Aug. 1, 1996).

¹¹¹ See 2011 Pole Attachments Order ¶77.

¹¹² See Attachment 1 to Freeburn Decl.

[&]quot;Section 224(f) is a broad mandate of "nondiscriminatory" access with a specific carve-out for certain conditions where electric utilities may deny access (*i.e.*, insufficient capacity, safety, reliability, and generally applicable engineering purposes). While the Commission continues to accord substantial leeway to electric utilities with regard to the practical application of this important exception, the Commission has not and could not delegate away the authority to ensure 'just and reasonable' and 'nondiscriminatory' terms and

and engineering" appear to be a nuisance to Fibertech—whose interest in those concepts run only as far as it benefits its own facilities—they are actually institutional concepts with meaning and import to electric utilities, like DEI, DEC and DEP. Duke Energy admits that the final sentence of paragraph 51 accurately quotes a portion of the 2011 Pole Attachments Order, and, as set forth above, Duke Energy does not contend that its exercise of safety, reliability and engineering discretion is unreviewable—only that it is entitled to "substantial leeway" on such matters, particularly where its exercise of such discretion does not serve as a threshold barrier to deployment.

52. Duke Energy denies the allegations in the first and second sentences of paragraph 52 for several reasons. First, Duke Energy's requirement that certain types of ancillary equipment be pad/pedestal mounted in the right-of-way is no more a "blanket prohibition" than any other standard that facilitates access of core communications infrastructure (such as the 12" separation standard, or the standard requiring that attachments be bonded to a utility's grounding system). Second, as expressed to Fibertech throughout the discussions, Duke Energy absolutely had safety, reliability and engineering concerns even under its erstwhile standard. For example, in its July 21, 2014 letter, Duke Energy wrote:

Duke Energy developed the MW2 and MW4 standards solely as an accommodation to wireless telecom carriers who prefer pole-mounted equipment cabinets. Duke Energy's original preference was (and remains) that all equipment cabinets be located in the public right of way, as reflected in the MW1 and MW3 standards. The only way Duke Energy can reconcile its safety and reliability concerns with pole-mounted equipment cabinets is through complete ownership and control of the cabinets. In essence, the MW2 and MW4 standards are the

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conditions under which utilities may grant or deny access." *In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future*, 26 F.C.C. Rcd. 5240, 5283 (2011) (citations omitted).

result of Duke Energy's good faith effort to balance its own safety and reliability concerns with the preferences of its wireless telecom attachers. 114

Similarly, in an August 20, 2014 email, Duke Energy wrote:

As Fibertech probably detected, DEI still had (and still has) some reluctance even over the standards that allow it to install and own pole-mounted equipment cabinets for purposes of third-party collocation. But those standards at least gave DEI ownership and control over all "dimensions" of the pole obstruction. 115

In hindsight, Duke Energy concedes that it should *never* have even contemplated accommodating third-party attachers in a manner beyond its policy and comfort zone. Though other carriers approached this effort cooperatively and in good-faith, Duke Energy should not have assumed other carriers would take the same approach. Third, the notion that this arrangement would ever have led to Duke Energy being paid thousands of dollars per pole per year is not grounded in fact. Fibertech never even proposed a different pricing model under the erstwhile standard. And no carrier ever deployed under this standard, so there is no basis for even guessing as to what the ultimate price would or should have been. For its part, and despite requests, Fibertech remained silent on its "experience with the ownership and maintenance costs of similar equipment cabinets."

 $^{^{114}\} See$ Letter from Karol Mack to Natasha Ernst (July 21, 2014), attached hereto as Appendix A.

 $^{^{115}}$ See Exh. 7 to Ernst Decl. $\P 3$, email from Karol Mack to Natasha Ernst (Aug. 20, 2014).

¹¹⁶ Sipes Decl. ¶11.

¹¹⁷ *Id*.

¹¹⁸ Sipes Decl. ¶13; see also Freeburn Decl. ¶12.

¹¹⁹ Id

 $^{^{120}}$ See Letter from Karol Mack to Natasha Ernst (July 21, 2014), attached hereto as Appendix A.

Duke Energy also denies the allegations in the third and fourth sentences of paragraph 52. There are numerous safety, reliability and engineering reasons behind Duke Energy's standards and Fibertech's focus on "the potential need to move equipment" misses the forest for the trees. In addition to determining what is best practice for any particular pole, Duke Energy must also think broadly about the entire distribution system and the cumulative effect of any pole-specific decision. 121 Fibertech only has to think about a single pole (or a small group of poles). Duke Energy does not have that luxury; its decisions must account for both the long and short view, as well as pole-specific and system-wide impact. 122 So, while Fibertech may trivialize "the potential need to move equipment" on a particular pole, what Fibertech misses is the overall systemic impact of any particular practice. 123 When equipment enclosures are polemounted, it in essence takes out an entire quadrant (or more) for setting replacement poles, because the new pole cannot be installed close enough to the old pole due to equipment box interference. 124 Such pole-mounted equipment also either forecloses or complicates pole climbing by linemen, which is still a regularly employed maintenance practice even where poles are in bucket-truck-accessible locations. 125 Even if a pole can be climbed by managing the complications, equipment boxes increase the risk of injury during a fall (stuff to hit awkwardly on the way down). 126

With respect to the allegations in the fifth sentence of paragraph 52, Duke Energy admits that DEI and DEC allowed pole-mounted equipment boxes before the July 2012 merger

¹²¹ Sipes Decl. ¶14; see also Robeson Decl. ¶13.

¹²² *Id*.

¹²³ *Id*.

 $^{^{124}}$ Robeson Decl. ¶17.

¹²⁵ *Id*.

¹²⁶ *Id*.

with Progress Energy, but denies the allegations as they relate to DEP. DEP has not allowed pole-mounted equipment boxes since the early 1980s. 127 As part of the merger between Duke Energy Corporation and Progress Energy, the combined companies evaluated their predecessors' various standards and adopted unified standards that reflected best practices. 128 One of those best practices adopted by the combined companies was DEP's long-standing practice of requiring cumbersome ancillary equipment to be pad/pedestal mounted in the right-of-way. 129 With respect to the allegations in the sixth sentence of paragraph 52, Duke Energy admits that some other companies allow pole-mounted equipment boxes and further states that other companies—like DEI, DEC and DEP—require that such equipment be pad/pedestal mounted in the right-of-way. Duke Energy denies the allegations in the seventh (final) sentence of paragraph 52. If Duke Energy's "Standard 1" was intended to extract monopoly rents, Duke Energy would not have either (a) actively urged Fibertech to attach under "Standard 1" or (b) withdrawn "Standard 2" entirely. Moreover, it is presumptuous for Fibertech to claim that the price point under a withdrawn standard was a "monopoly rent" when Fibertech never urged an alternative price point and never provided any information about its "experience with the ownership and maintenance costs of similar equipment cabinets."131

53. Duke Energy admits that Fibertech accurately quotes a portion of the 2011 Pole Attachments Order, but denies the remaining allegations in paragraph 53 because Duke Energy's

¹²⁷ Robeson Decl. ¶15.

¹²⁸ Robeson Decl. ¶7.

¹²⁹ *Id*.

 $^{^{130}}$ See ¶¶ 15,52 above.

¹³¹ *Id*.

standards actually facilitate (rather than reject) wireless antenna access.¹³² The mere fact that Duke Energy's standards may require Fibertech to adjust its preferred collacation of certain types of ancillary equipment does not convert a standard for deployment into a denial of access.

54. Duke Energy denies the allegations in paragraph 54. Fibertech does not even contend that Duke Energy is applying its standards in a discriminatory manner, so the only possible question is whether the standards are reasonable. The notion of "pretext" may rightly have a place in the analysis of a charge of discrimination, but not in the analysis of whether a standard is reasonable. Moreover, Fibertech is attempting to isolate a single restriction within a standard, rather than looking more broadly at the entire standard or even more broadly at all other rates, terms and conditions for attachment. This myopia focus is misplaced:

In any event, the fairness of any term or condition of a CATV pole-leasing agreement will have to be judged in relation to the other contract provisions, prevailing practices in the industries involved, and the particular pole rate charges, matters which cannot be precisely translated into statutory language. 133

B. Duke Energy's Standards are Non-Discriminatory, Reasonable and Lawful

- a. <u>Duke Energy Does Not Charge for Equipment in the Unusable Space</u>
- 55. Duke Energy denies the allegations in the first sentence of paragraph 55. First, as set forth above, in addition to the antenna itself, Duke Energy's standards also allow "the cable feeding the antenna and the cable feeding the amplifier in the pedestal." Second, Duke Energy's standards comply with the Act in any event because, under Fibertech's postulation, no standard would ever be permitted under the Act. Clearly, this is not the case. With respect to the

¹³² Freeburn Decl. ¶9; *id.* at Attachment 1.

¹³³ See Adoption of Rules for the Regulation of Cable Television Pole Attachments, 68 F.C.C.2d 1585, ¶13 (1978) (quoting Senate Report 95-580, at 21).

¹³⁴ See Attachment 1 to Freeburn Decl.; Freeburn Decl. ¶9.

allegations in the second sentence of paragraph 55, Duke Energy admits that the Act itself does not differentiate between certain types of equipment, but common sense does.

- 56. Duke Energy admits that Fibertech accurately quotes the cited Public Notice, but denies that it is an "example" of anything referenced in paragraph 55 of the complaint. The 2004 Public Notice was issued because "wireless carriers have alleged that they have been denied access to utility poles for the placement of wireless antennas on pole tops." That, of course, is not the case here, as Fibertech itself has stated. 136
- Cablevision v. SWEPCO case, but denies the remaining allegations in paragraph 57. Texas Cablevision had nothing to do with a utility's standards and was not even an access case; it was a case about whether power supply cables and underground risers were additional attachments for purposes of determining the applicable rate under the Commission's formula. Neither Texas Cablevision nor any other Commission precedent stands for the proposition that third-party attachers have the unfettered right to attach anything they want to the space on a pole beneath the communications space. The Commission has repeatedly held that "a utility may limit the circumstances in which a particular [attachment] technique can be used" and that "it can choose

Wireless Telecommunications Bureau Reminds Util. Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Util. Poles at Reasonable Rates, 19 F.C.C. Rcd. 24930, 24930 (2004)(hereafter "2004 Public Notice").

 $^{^{136}}$ See Exh 6 to Ernst Decl. ¶ 7, letter from Natasha Ernst to Karol Mack (June 13, 2014)("Fibertech appreciates that Duke does not have 'blanket prohibitions on pole top access for wireless antennas...").

¹³⁷ See In the Matter of Texas Cablevision Co., and T.V. Cable Inc., v. Southwest Electric Power Company, 1985 FCC LEXIS 3818 (Feb. 26, 1985).

not to use or allow them at all."¹³⁸ Furthermore, the Commission has at least twice specifically noted in its pole attachment rulemaking orders that a "communications cabinet" and "concrete pads to support the cabinet" are common features of wireless antenna attachments.¹³⁹

58-59. Duke Energy denies the allegations in paragraphs 58 and 59, as stated. In any event, these allegations are irrelevant to the matters before the Commission in this case because Duke Energy does not charge any additional amounts for "the cable feeding the antenna and the cable feeding the amplifier in the pedestal"—both of which are pieces of equipment Duke Energy allows third parties to attach beneath the communications space.¹⁴⁰

- 60. Duke Energy admits the allegations in paragraph 60.
- Duke Energy denies the allegations in paragraph 61 for at least two reasons. First, under the short-lived proposal, Fibertech would not have "ceded" ownership to DEI; DEI would have owned the restricted equipment from the outset. Second, this short-lived proposal would not have had anti-competitive effects (or any effects at all) because Fibertech was not required to pursue this proposal, and in fact DEI actively discouraged Fibertech from pursuing the proposal that Fibertech now labels as "anticompetitive." DEI only offered this standard to Fibertech at

 $^{^{138}}$ See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, 26 F.C.C. Rcd. 5240, ¶236; see also In the Matter of Implementation of Section 224 of the Act A Nat'l Broadband Plan for Our Future, 25 F.C.C. Rcd. 11864, ¶11 (2010).

¹³⁹ See e.g., In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection Between Local Exch. Carriers & Commercial Mobile Radio Serv. Providers, 14 F.C.C. Rcd. 18049, ¶44 (1999) ("wireless attachments may include 'an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cable connecting antennas to the cabinet, concrete pads to support the cabinet . . .") (quoting In the Matter of Implementation of Section 703(E) of the Telecommunications Act, Report and Order, 13 F.C.C. Rcd 6777, ¶41(1998)).

¹⁴⁰ Freeburn Decl. ¶¶9,12.

¹⁴¹ Freeburn Decl. ¶¶10,12; see also Sipes Decl. ¶11.

¹⁴² *See* ¶52 above.

the time because it had already developed it at the request of another carrier, and it might have been discriminatory to not at least give Fibertech the option of pursuing this standard (even though Duke Energy preferred that Fibertech deploy under the basic standard).¹⁴³

- b. <u>Duke Energy's Restrictions on What Type of Equipment Can Be Installed</u>
 <u>Beneath the Communications Space Are Applied in a Non-Discriminatory</u>
 Manner and Fibertech Does Not Contend Otherwise.
- 62. Duke Energy admits (1) that DEI, DEC and DEP allow risers beneath the communications space (and that Duke Energy's standards allow Fibertech to attach risers beneath the communications space), (2) that DEI and DEC (prior to the merger between Duke Energy Corporation and Progress Energy) allowed other equipment attachments beneath the communications space, and (3) that such risers and equipment, for the most part, do not trigger any additional consideration beyond what is already set forth in the joint use agreement or pole license agreement governing such attachments. Duke Energy denies any remaining allegations in paragraph 62. As set forth above in paragraph 30, DEI, DEC and DEP adopted a unified standard as a result of the merger that requires cumbersome ancillary equipment to be pad/pedestal mounted in the right-of-way.
- 63. Duke Energy denies the allegations in paragraph 63 for at least three reasons. First, Duke Energy does not "allow itself to attach equipment [beneath the communications space] but deny Fibertech and others the same ability." As set forth above, neither Duke Energy nor third-parties are allowed to attach cumbersome equipment boxes to the pole, but all parties are allowed to attach risers ("the only antenna equipment permitted on the pole is the antenna, the cable feeding the antenna and the cable feeding the amplifier in the pedestal"). 144 Second, the

¹⁴³ Freeburn Decl. ¶10.

¹⁴⁴ See Attachment 1 to Freeburn Decl.; Freeburn Decl. ¶5.

mere fact that Duke Energy makes a particular type of attachment does not necessarily mean it is acceptable from engineering perspective for a third-party to do the same. Third, as the commission has previously explained, "the nondiscrimination requirement of section 224(f)(1) prohibits a utility from favoring itself or its affiliates with respect to the provision of telecommunications and video services." Here, even during the short life of "Standard 2," Duke Energy's ownership of the pole-mounted equipment box beneath the communications space was never for "the provision of telecommunications and video services," itself or through an affiliate. 147

64-65. Duke Energy admits that Fibertech accurately quotes the cited portions of the Commission's 2011 Pole Attachments Order in paragraph 64, but denies any remaining allegations in paragraphs 64 and 65. The 2011 Pole Attachments Order made clear that utilities may adopt prospective policies:

A utility may, however, choose to reduce or eliminate altogether the use of a particular method of attachment used on its poles, including boxing or bracketing, which would alter the range of circumstances in which it is obligated to allow future attachers to use the same techniques. ¹⁴⁸

Similarly, in the 2010 Order referenced by Fibertech in paragraph 64, the Commission stated:

Some pole owners contend that the use of boxing and bracketing complicates pole maintenance and replacement, can compromise safety, and may not be consistent with sound engineering practices. Commenters also assert that utilities should be free to prohibit their use or, at the very least, to consider the appropriateness of such techniques on a case-by-case basis. We agree and emphasize that our commitment to ensuring this form of nondiscriminatory access is limited by the utility's existing practices. If a utility believes that boxing and bracketing are

¹⁴⁵ *See* ¶38 above.

¹⁴⁶ See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499, ¶1168 (1996).

¹⁴⁷ Freeburn Decl. ¶12.

¹⁴⁸ See 2011 Pole Attachments Order ¶227.

fundamentally unsafe or otherwise incompatible with proper attachment practice, it can choose not to use or allow them at all. 149

If a utility can prohibit boxing and bracketing (which are techniques associated with core communications infrastructure), it should be able to prohibit certain types of cumbersome ancillary pole-mounted equipment beneath the communications space. Moreover, this is not a situation where Duke Energy has simply changed its policy from allowing to disallowing cumbersome equipment attachments beneath the communications space. The change, as it relates to DEI and DEC, is a result of bringing uniformity to the operating standards among the various post-merger operating companies. DEP's standards on this issue have been consistent for more than 30 years. Though Fibertech urges a lowest-common-denominator approach to electric distribution system engineering, that is not an approach Duke Energy can accept and it is not an approach the Commission should endorse.

- c. <u>Fibertech Has Not Submitted an Application to Attach to Any Particular Duke Energy Pole and Therefore it is Impossible to Provide Fibertech</u>
 With the "Pole-by-Pole" Basis for Denial.
- 66. Duke Energy admits that Fibertech accurately quotes the cited portions of the 2011 Pole Attachments Order, but denies any remaining allegations in paragraph 66. As set forth above, Fibertech has not yet submitted a request to attach to any particular Duke Energy pole. 152
- 67. Duke Energy denies the allegation of paragraph 67, as stated, because Fibertech has not yet submitted a request to attach to any particular pole and therefore it would be

¹⁴⁹ See In the Matter of Implementation of Section 224 of the Act; A Nat'l Broadband Plan for Our Future, 25 F.C.C. Rcd. 11864 ¶111 (2010)(internal citations omitted).

¹⁵⁰ Sipes Decl. ¶14.

¹⁵¹ *Id*.

¹⁵² See ¶41 above; see also Freeburn Decl. ¶24.

impossible to provide "specific and detailed reasons for such rejection on a pole-by-pole basis." DEI even made this specific point in its October 8, 2014 email to Fibertech:

DEI will evaluate any specific request for access submitted by Fibertech. Though DEI's operating presumption (based on DEI's standards) will be to disallow polemounted equipment enclosures, DEI will consider each request on its own merits. ¹⁵³

To this point, Fibertech asserted in its October 9, 2014 response email: "We have been and continue to request access to Duke poles for Fibertech's necessary equipment to support high speed wireless broadband services." This is not a request for access because it is not something that can be either granted or denied. If Duke Energy had theoretically granted this "request," it would not mean that Fibertech was authorized to mount equipment on any particular pole. Moreover, if Fibertech's theory is correct, and Duke Energy's standard itself is a denial of access, then all standards that limit attachment techniques or types are denials of access (and, under Fibertech's theory, per se invalid). This is not the case under Commission precedent and cannot be the case as a matter of sound distribution system engineering. 155

- 68. Duke Energy admits that Fibertech has argued that its cumbersome equipment attachments beneath the communications space would not interfere with safety, reliability or generally applicable engineering principles, but Duke Energy respectfully disagrees with Fibertech on this point and denies any remaining allegations in paragraph 68. 156
- 69. Duke Energy lacks knowledge or information sufficient to admit or deny the allegations in paragraph 69 and therefore denies the allegations. In any event, as explained above, the mere ability to move whatever cumbersome equipment might be attached beneath the

¹⁵³ See Exh. 11 to Ernst Decl. ¶5, email from Karol Mack to Natasha Ernst (Oct. 8, 2014).

¹⁵⁴ See Exh. 12 to Ernst Decl. ¶2, email from Natasha Ernst to Karol Mack (Oct. 9, 2014).

¹⁵⁵ Robeson Decl. ¶¶11-16.

¹⁵⁶ *Id*.

communications space on a pole does not resolve the safety, reliability or engineering concerns associated with the equipment or the cumulative effect of the equipment. 157

- 70. Duke Energy denies the allegations in paragraph 70. The capacity, safety, reliability and engineering basis for Duke Energy's small cell standard is set forth above in paragraphs 42 and 52.
 - d. <u>Fibertech Has Not Even Alleged—Let Alone Demonstrated—That Duke Energy's Standards Are a Barrier to Small Cell Deployment</u>
- 71. Duke Energy denies the allegations in paragraph 71. Upon information and belief, Fibertech and other carriers have successfully deployed small cell antennas under standards similar to Duke Energy's standards. Further, other carriers have successfully deployed wireless antenna under Duke Energy's standards within DEP's service area and ground-mounted equipment is common in Duke Energy's other service areas. Moreover, Fibertech has never contended (and does not contend in its complaint) that Duke Energy's standards serve as an actual barrier to deployment. Instead, Fibertech argues that its deployment preferences should be elevated over Duke Energy's standards.
- 72. Duke Energy admits that Fibertech accurately quotes the Commission's recent Wireless Siting Order, and further admits the Commission has recognized the importance of deployment of DAS and small cells. In fact, Duke Energy even admits that the deployment of DAS and small cells are important, which is why Duke Energy was ahead of the curve in developing standards to accommodate both types of attachments.¹⁶¹

 $^{^{157}}$ See ¶52 above.

¹⁵⁸ *See* ¶26 above.

¹⁵⁹ Freeburn Decl. ¶16; *see* Attachments 2A, 2B, 2C, 2D to Freeburn Decl.

¹⁶⁰ Freeburn Decl. ¶25.

 $^{^{161}}$ Freeburn Decl. $\P9$; see Attachment 1 to Freeburn Decl.

Duke Energy's small cell standard is not a "blanket opposition to any appurtenant equipment." It is a standard that specifically allows certain types of appurtenant equipment ("the cable feeding the antenna and the cable feeding the amplifier in the pedestal") but requires that other equipment be pad/pedestal-mounted in the right-of-way. Second, Duke Energy's standards facilitate small cell deployment. So, to the extent small cell deployment is part of "basic public policy," Duke Energy's standard actually promotes, rather than "goes against," such policy.

V. FIBERTECH'S COUNTS ARE WITHOUT MERIT

Count 1: There Has Been No Denial of Access

- 74. Duke Energy adopts and incorporates paragraphs 1 through 73 above as if fully set forth herein.
- 75. Duke Energy denies the allegations in paragraph 75. As set forth above, Duke Energy's standards actually facilitate small cell deployment, and Fibertech has not even alleged—let alone demonstrated—that Duke Energy's standards operate as a de facto barrier to deployment. Instead, Fibertech is merely attempting to elevate its own deployment preferences over Duke Energy's standards. Furthermore, as also set forth above, there has not been an actual "denial of access" because Fibertech has not yet requested access to any particular pole.
- 76. Duke Energy admits that, in any single case, Fibertech's cumbersome ancillary equipment probably can be safely attached to a utility pole. As set forth above, though, there is also a *cumulative* element to Duke Energy's standards. Reasonable electric utility pole owners can reach different conclusions on what is appropriate for their systems, but the fact that they

¹⁶² See Attachment 1 to Freeburn Decl.; Freeburn Decl. ¶9.

¹⁶³ *Id*.

may reach different conclusions does not mean one of them is right and the other wrong.¹⁶⁴ Duke Energy denies any remaining allegations in paragraph 76.

77. Duke Energy denies the allegations in paragraph 77. The capacity, safety, reliability and engineering basis for Duke Energy's standards is set forth above in paragraphs 42 and 52. 165

Count 2: Duke Energy's Small Cell Standard is Not Only Non-Discriminatory But Also Just and Reasonable

- 78. Duke Energy adopts and incorporates paragraphs 1 through 77 above as if fully set forth herein.
- 79. Duke Energy denies the allegations in paragraph 79 for all of the reasons set forth above, including but not limited to (a) the fact that Duke Energy's standards *do* allow the placement of certain equipment on poles, (b) the fact that there is a significant difference in Duke Energy's ownership of a facility and a third-party's ownership of a similar facility (e.g., energized electric lines), and (c) the fact that Duke Energy does not allow itself to attach the equipment to its poles that Fibertech demands to attach.
- 80. Duke Energy denies the allegations in paragraph 80 for all of the reasons set forth above, including but not limited to (a) the fact that Duke Energy cannot deny a request for access on a pole-by-pole basis when there has not been a corresponding request for access on a pole-by-pole basis, and (b) the fact that a standard itself is not a denial of access (despite Fibertech's efforts to conflate the two).
- 81. Duke Energy admits the allegations in paragraph 81, but also states that nothing in the Pole Attachments Act "shall be construed to apply to, or to give the Commission jurisdiction

¹⁶⁴ Robeson Decl. ¶16.

¹⁶⁵ See Robeson Decl. ¶¶11-16.

with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way for pole attachments in any case where such matters are regulated by a state." ¹⁶⁶

82. Duke Energy denies that its small cell standards are "unjust and unreasonable" but lacks knowledge or information sufficient to admit or deny whether Fibertech's refusal to deploy under Duke Energy's standards has caused harm to Fibertech's business, and therefore denies such allegations. Any harm Fibertech has suffered is a result of its own unreasonable and unexplained refusal to consider anything other than its preferred means of deployment. If there is a wound at all, it is self-inflicted. Duke Energy denies any remaining allegations in paragraph 82.

VI. RELIEF REQUESTED

Duke Energy respectfully requests that the Commission, separately or in the alternative:

- a. dismiss Fibertech's complaint, in whole or in part;
- b. deny the relief sought in Fibertech's complaint, in whole or in part;
- c. dismiss the complaint, or hold it in abeyance, as to DEI due to the fact that the Indiana Utility Regulatory Commission has jurisdiction over this dispute;
- d. dismiss the complaint as to DEC and DEP due to Fibertech's failure to follow the Commission's executive-level meeting rule (47 CFR § 1.1404(k));
- e. declare that Fibertech must first submit an application for attachment to specific poles before complaining that it has been denied access under section 224(f);
- f. allow Duke Energy discovery on (a) the technology available to Fibertech for deployment under Duke Energy's standards, and (b) the instances in which Fibertech and other similarly situated carriers have deployed under standards similar to Duke Energy's standards;
- g. designate any disputed issues of fact for an evidentiary hearing; and
- h. grant Duke Energy other such relief as the Commission deems necessary and just.

¹⁶⁶ 47 U.S.C. §224(c)(1).

Respectfully submitted this 17th day of December, 2014.

/s/ Eric B. Langley

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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of December, 2014, I have served the forgoing RESPONSE TO FIBERTECH'S COMPLAINT upon the following in the manner indicated below:

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/s/ Eric B. Langley

Of Counsel

APPENDIX A



OFFICE OF THE GENERAL COUNSEL

DUKE ENERGY DEC45A / PO. Box 1321 CHARLOTTE, NC 28201

KAROL P. MACK Associate General Counsel

Duke Energy Corporation 550 South Tryon Street - DEC45A Charlotte, NC 28202

704.382.8165 office 980.373.9727 fax Karol.Mack duke-energy.com

July 21, 2014

Ms. Natasha Ernst Director of Small Cell Deployment Fiber Technologies Networks, LLC 300 Meridian Centre Rochester, NY 14618

Re: Response to Fibertech's June 13, 1014 Letter Requesting

Executive-Level Meeting Between Duke Energy Indiana and Fibertech

Dear Ms. Ernst:

Please accept this letter in response to your June 13, 2014 correspondence requesting an executive-level meeting between Duke Energy Indiana ("Duke Energy") and Fiber Technologies Networks, LLC ("Fibertech"). By separate correspondence, the requested meeting has been scheduled for August 4, 2014 at 1:00 p.m. at Duke Energy's offices in Plainfield, Indiana. The address is 1000 E. Main Street, Plainfield, IN 46168.

Representing Duke Energy in the meeting will be the following:

- Melody Birmingham-Byrd, Senior Vice President, Midwest Delivery Operations
- Robert Sipes, Vice President, Customer Operation Services
- Scott Freeburn, Joint Use & Tower Leasing Manager
- Me, Associate General Counsel
- Eric Langley, Outside Counsel, Balch & Bingham LLP

We understand that Fibertech will be represented in the meeting by the following:

- Charles Stockdale, Vice President & General Counsel
- Mike Brown, Vice President of Operations
- You, Director of Small Cell Deployment
- Scott Thompson, Outside Counsel, Davis Wright Tremaine LLP

Though I anticipate the parties will discuss these issues in further detail during the August 4 meeting, there are several points we wanted to address in writing prior to the meeting, in order to facilitate a thoughtful discussion between the parties and to ensure there is no misunderstanding between the parties.

Duke Energy's Pole Top Antenna Attachment Standards

First, and most importantly, the pole top antenna attachment standards we have offered to Fibertech are the same standards we have offered (and will continue to offer) to *any* wireless telecom carrier, including any affiliate of Duke Energy. For this reason alone, the standards, and the application of those standards, are per se non-discriminatory. The best we can tell from your letter, Fibertech does not even allege that Duke Energy is discriminating in favor of a competitor to Fibertech. Instead, it appears Fibertech's argument is that because Duke Energy "allow[s] itself to attachment equipment in the common space," it should allow third-parties to do the same. We believe this argument misses the mark for at least two reasons:

- 1. Duke Energy *does* allow the attachment of third-party equipment (such as risers) in the unusable space. The standards simply prohibit third-party ownership of a specific type of equipment in the unusable space (large, pole-mounted equipment cabinets) for reasons of safety and reliability.
- 2. There is a critical operational difference between Duke Energy owning pole-mounted equipment cabinets versus a third party owning the same. By retaining ownership of the cabinets, Duke Energy retains sole control over, and responsibility for, the cabinets. This allows Duke Energy to more effectively manage the safety and reliability issues presented by the cabinets through workarounds, removals, etc.

Second, Duke Energy's offering of identical standards to all wireless telecom carriers (whether they are potential Fibertech customers or not) is the exact *opposite* of anticompetitive behavior. It would, indeed, be anticompetitive if Duke Energy offered Fibertech a different standard than it offered Fibertech's competitors. But that is not at all what is happening here. If Fibertech's potential carrier customers approach Duke Energy directly, they are offered the same standards we have offered to Fibertech. In our view, it would be anti-competitive and discriminatory if we offered Fibertech a more favorable standard than offered to others.

Third, Duke Energy is not competing with Fibertech for customers. In fact, Duke Energy is not competing in the provision of telecommunications services *at all*. If any Duke Energy affiliate seeks to make pole top antenna attachments for purposes of competitive telecommunications services, it will be offered the same standards offered to Fibertech.

Duke Energy developed the MW 2 and MW 4 standards solely as an accommodation to wireless telecom carriers who prefer pole-mounted equipment cabinets. Duke Energy's original

Ms. Natasha Ernst July 21, 2014 Page 3

preference was (and remains) that all equipment cabinets be located in the public right of way, as reflected in the MW 1 and MW 3 standards. The only way Duke Energy can reconcile its safety and reliability concerns with pole-mounted equipment cabinets is through complete ownership and control of the cabinets. In essence, the MW 2 and MW 4 standards are the result of Duke Energy's good faith effort to balance its own safety and reliability concerns with the preferences of its wireless telecom attachers. To be clear, neither Fibertech nor any other wireless telecom carrier is required to attach its facilities under the MW 2 or MW 4 standards. Fibertech may still attach its facilities under the MW 1 and MW 3 standards. But Fibertech is not entitled to a more favorable arrangement than its competitors (or, as may be the case here, its customers)—especially an arrangement at odds with Duke Energy's judgment on matters of safety and reliability—simply because Fibertech is attempting to assume the role of a "wholesaler."

Fourth, Duke Energy's standards specifically facilitate, rather than restrict, pole top access for wireless antennas. In fact, Duke Energy's standards include specifications for pole top antenna attachments on both secondary and primary poles. Fibertech seems to agree: "Fibertech appreciates that Duke does not have 'blanket prohibitions on pole top access' for wireless antennas." (p. 2). The only poles categorically excluded from pole top antenna attachments are equipment poles (poles with capacitor banks, reclosers, switches, underground dips, etc.), and Fibertech does not appear to contend that Duke Energy's standards serve as a de facto barrier to deployment. In other words, though we understand from your e-mails that two cities in Indiana have told Fibertech they would "like" for everything to be on the existing pole, nobody has told Fibertech it is prohibited from locating an equipment cabinet in the public right of way. Thus, even if Fibertech ignores the alternative solutions provided by the MW 2 and MW 4 standards, it appears Fibertech can still deploy under the MW 1 and MW 3 standards.

From what we can tell, Fibertech simply disagrees with some of the details within Duke Energy's standards because Fibertech *prefers* a different arrangement. This is neither a reason for Duke Energy to revise its standards nor a reason the FCC would find them unlawful.

The FCC specifically contemplates that utilities will have their own standards:

In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise. A utility's individual standards cover not simply its policy with respect to attachments, but all aspects of its business. Standards vary between companies and across different regions of the country based on the experiences of each utility

Ms. Natasha Ernst July 21, 2014 Page 4

and on local conditions. . . . As a result, each utility has developed its own internal operating standards to suit its individual needs and experiences.

In the Matter of Implementation of the Local Competition Provisions in the Telecom Act of 1996, 11 FCC Rcd. 15499, ¶ 1148 (August 1, 1996).

To some extent, every operating standard serves as a limitation on certain types of attachments or attachment techniques. Because Duke Energy's standards facilitate pole top access for wireless antennas, are applied in a non-discriminatory manner, and are suited to Duke Energy's individual needs and experiences, we believe the standards fall well within the letter and spirit of the Pole Attachments Act and the FCC's rules and regulations.

Duke Energy's Pricing Models

First, though of marginal relevance to our current discussion, Fibertech's understanding regarding the basis for Duke Energy Ohio's pole top antenna standards is incorrect. Duke Energy Ohio's policies, and the basis for those policies, are consistent with Duke Energy Indiana. If Fibertech was told otherwise by someone at Duke Energy Ohio, Fibertech was told incorrectly.

Second, as we understand your letter, Fibertech's concerns over Duke Energy's pricing models lay exclusively with the MW 2 and MW 4 standards. In other words, we do not interpret your letter as taking exception to the pricing model associated with the MW 1 and MW 3 standards. If our interpretation is incorrect, we trust you will let us know.

The pricing model associated with the MW 2 and MW 4 standards includes not only the pole top antenna attachments and associated equipment (such as risers), but also includes collocation of Fibertech's electronics and other equipment within Duke Energy's pole-mounted cabinet. This is an integrated cost solution that captures Duke Energy's additional costs associated with the ownership and maintenance of the equipment cabinet. Though we do not view the collocation of electronics and other equipment within the cabinet as a "pole attachment" (as that term is used in the Pole Attachments Act), we believe our proposed cost structure associated with the MW 2 and MW 4 standards would be justified nonetheless under existing law.

In any event, the pricing model associated with the MW 2 and MW 4 standards is a *proposed* pricing model. If Fibertech's experience with the ownership and maintenance costs of similar equipment cabinets is vastly different than our proposed model, we are open to discussing the precise price point with you. Perhaps more to the point, even if Duke Energy's proposed pricing model associated with the MW 2 and MW 4 standards is viewed as inconsistent with the FCC's rules and regulations, Fibertech can still make pole top antenna attachments

Ms. Natasha Ernst July 21, 2014 Page 5

under the MW 1 and MW 3 standards at a price point to which Fibertech apparently takes no exception.

Conclusion

I hope this letter is useful to Fibertech in understanding and considering Duke Energy's position on the important issues raised in your June 13, 2014 letter. We look forward to meeting with your team on August 4, 2014 in Plainfield, Indiana. If there are specific questions I can answer or specific information I can provide in advance of the meeting to facilitate our discussion, please let me know.

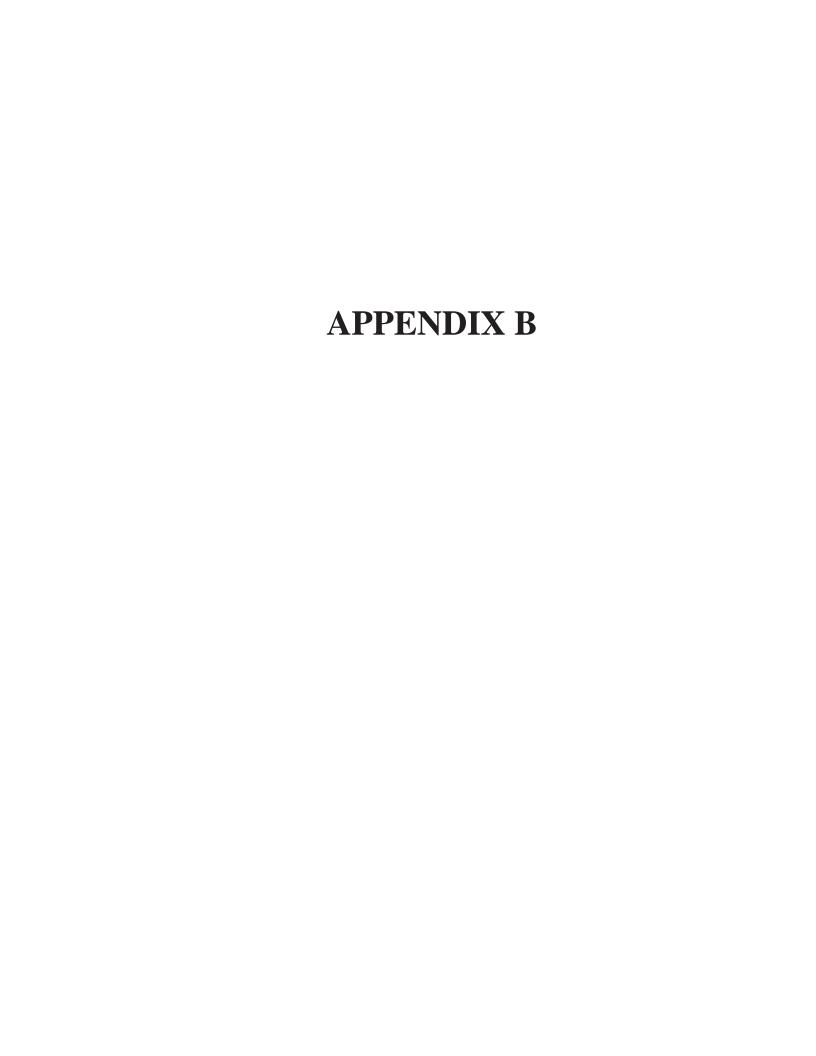
Sincerely,

Karol Mack

Associate General Counsel

cc: Melody Birmingham-Byrd

Robert Sipes
Scott Freeburn
Eric Langley



----Original Message-----

From: Freeburn, Scott [mailto:Scott.Freeburn@duke-energy.com]

Sent: Wednesday, February 05, 2014 10:04 AM

To: Ernst, Natasha

Cc: Bryan, Van H; Walker, Janice L; Russell, Andy; Langley, Eric Subject: RE: Duke-Fibertech Wireless Attachment Agreement

Natasha,

The MW2 and MW4 standards are for Duke owned equipment boxes on our poles and are only referenced in the Master Wireless Lease Agreement. That is still an option for Fibertech and we offered it to you on an email sent on January 27, 2014. The storm hardening provisions in Florida have nothing to do with the current ban on equipment boxes on poles in that state. That is a company standard that has been in place for over 15 years. That same standard has applied to North Carolina and South Carolina in the Legacy Progress Energy area as well. Now that the integration of Progress Energy and Duke is complete, the Standards department has adopted this wireless antenna attachment standard system wide.

You have the agreement and attachment standard that all other wireless carriers on our system are complying with when attaching DAS or Small Cell antennas. Locating equipment on a pedestal has not served as a barrier to deployment for other companies, but if Fibertech runs into a situation where it is not allowed to put its equipment on a pedestal (for example, if the city or a landowner prohibits it) we will work with Fibertech on a solution. At this point we have no reason to deviate from this attachment standard. If you wish to continue with the wireless attachment process we can arrange a meeting to discuss the redlined agreement that you sent.

Thanks,

Scott Freeburn
Duke Energy
Joint Use & Tower Leasing Manager
3300 Exchange Place
Lake Mary, FL 32746
(407) 942-9415 or 280-2415 (office)
(407) 312-3725 (cell)

APPENDIX C

Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

Fiber Technologies Networks, L.L.C.,)	
Complainant,)))	
v.	Proceeding No.	Proceeding No. 14-227 File No. EB-14-MD-015
Duke Energy Indiana, Inc.; et al.,	1	
Respondents.)	
)	
)))	

DECLARATION OF SCOTT FREEBURN

- 1) My name is Scott Freeburn. I am the Joint Use & Tower Leasing Manager for Duke Energy Corporation ("Duke Energy") (the parent corporation of Duke Energy Indiana, Inc. ("DEI"), Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, Inc. ("DEP")). My job duties currently include overseeing all aspects of the joint use and pole attachment relationships for Duke Energy's subsidiaries. This includes relationships in Indiana, Ohio, Kentucky, North Carolina, South Carolina, and Florida. I have held this position since November 2012.
- Prior to holding my current position, I was the Manager, Joint Use & Locates, for Progress Energy, Inc. ("Progress"). I held that position from March 2004 until I assumed my current position shortly after the merger between Duke Energy and Progress in July 2012. As Manager, Joint Use & Locates for Progress, my responsibilities over joint use and pole attachments were similar to my current position (with the exception that my current position encompasses a broader geographic area than my former position, and with the exception that my current position also includes tower leasing).

- 3) I hold a Bachelor of Science degree from the University of Florida. The facts set forth in this declaration are based on my personal knowledge, or knowledge available to me in my capacity as Joint Use & Tower Leasing Manager for Duke Energy or in my former capacity as the Manager, Joint Use & Locates, for Progress.
- 4) I have read and am familiar with the Pole Attachment Complaint filed by Fiber Technologies Networks, L.L.C. ("Fibertech") in the above-captioned proceeding, and I am otherwise familiar with the facts and circumstances of this case.
- Duke Energy's distribution standards require that large equipment cabinets or enclosures (such as amplifiers, power supplies, battery back-ups, disconnect switches and meter bases) be pad/pedestal mounted in the right of way. Absent extenuating circumstances, Duke Energy does not allow this type of equipment (whether owned by Duke Energy, an affiliate of Duke Energy, or an unrelated entity such as Fibertech) to be mounted beneath the communications space on Duke Energy's poles. The types of extenuating circumstances that might warrant departure from our standards would include, by way of example, local ordinances that prohibit pad or pedestal mounted equipment boxes. There may be others, as well. We would evaluate any specific situation on a case-by-case basis.
- 6) Duke Energy does allow the attachment of some ancillary equipment owned by third-parties beneath the communications space of a Duke Energy pole, such as risers and the cable within the risers. The installation of risers and related equipment does not usually trigger any additional consideration beyond what is already set forth in the joint use agreement or pole license agreement governing such attachments.
- 7) Prior to and apart from Fibertech's inquiry on small cell antenna attachments in Indiana, Fibertech had inquired about pole top antenna attachments on Duke Energy Ohio, Inc.'s

("DEO") poles in Ohio and Kentucky. Fibertech was advised then of DEO's standard requiring that third-party equipment boxes be pad/pedestal mounted in the right-of-way (off-pole).

- 8) On April 24, 2014, on behalf of DEI, I sent Duke Energy's standards for small cell antenna attachments for both primary and secondary poles to Natasha Ernst of Fibertech. Attached hereto as Attachment 1 is a true and correct copy of Duke Energy's standards for wireless antenna attachments for primary and secondary poles (which were in place at that time (i.e., "Standard 1" and "Standard 2")) that were attached to my email to Ms. Ernst. "Standard 1" consists of "MW 1" and "MW 3," and "Standard 2" consists of "MW 2" and "MW 4." "MW 1" and "MW 2" concern primary poles, and "MW 3" and "MW 4" concern secondary poles.
- 9) These Duke Energy standards limit wireless antenna attachments to a single antenna per pole (because there is only one top per pole). Although Duke Energy's standards require that some equipment be pad/pedestal mounted in the right-of-way, both the primary and secondary pole attachment standards specifically permit third-parties to attach "the antenna, the cable feeding the antenna and the cable feeding the amplifier in the pedestal" beneath the communications space. Neither Duke Energy's standards nor practice calls for additional compensation regarding the attachment of such feed cables. The pad/pedestal mounted standard is not merely a part of the small cell standard—it is part of all of Duke Energy's communications equipment standards. Duke Energy was willing to accommodate Fibertech's requests for antenna installations, which would require a pole change-out in almost every instance to obtain the necessary clearances in an effort to accommodate Fibertech and facilitate small cell deployment. Duke Energy understands that the deployment of DAS and small cell antennas is important, as reflected in Duke Energy's adoption of the standards attached hereto as Attachment 1, which accommodate both types of attachments on pole tops.

- 10) As of April 24, 2014, both "Standard 1" and "Standard 2" were available options. "Standard 2" developed as a result of another carrier's request that Duke Energy consider an arrangement by which the equipment ordinarily required to be pad-mounted in the right-of-way could be mounted on the pole instead. Duke Energy reluctantly agreed to pursue this in an effort to foster cooperation and small cell deployment, while at the same time managing Duke Energy's concerns relating to the safety, design, work practice impact, and control over such installations. At the time, the only way we could possibly reconcile our concerns while at the same time providing for pole-mounted equipment was through ownership of and complete control over the pole-mounted equipment. In fact, DEI only offered this standard to Fibertech at the time because DEI had previously developed it at the request of the other carrier, and we felt obligated to at least give Fibertech the option of pursuing this "Standard 2."
- Duke Energy since has withdrawn "Standard 2" because of the negative response Duke Energy received by Fibertech, and due to the fact that we had been reluctant in offering this alternative standard from the outset. At the time of such withdrawal, neither Fibertech nor any other entity had requested access under "Standard 2."
- 12) Under "Standard 2," a third-party attacher would not have owned the attached facilities. Duke Energy would have owned them. Prior to withdrawing "Standard 2," Duke Energy proposed an annual fee, which would have covered the installation and lease of the attached equipment, with no additional charge for the antenna attachment. This was a proposal, subject to negotiation. Fibertech never offered an alternative price proposal, and Fibertech never provided any information regarding its prior experiences with owning and/or maintaining polemounted equipment cabinets. The only discussion we ever heard from Fibertech with respect to "Standard 2" was its insistence that, if Duke Energy was willing to allow itself to own such pole-

mounted equipment, it also should allow Fibertech to own such pole equipment. During the short life of "Standard 2," Duke Energy's contemplated ownership of any pole-mounted equipment box beneath the communications space was never for the provision of telecommunications and video services, itself or through an affiliate.

- 13) To my recollection, Fibertech has never objected to or taken issue with DEI's perpole pricing rate in regards to the still-existent "Standard 1."
- On May 22, 2014, I met with Ms. Ernst, Eric Finnmore and Dave MacDonald of Fibertech in Cincinnati, Ohio for the purported purpose of discussing Duke Energy's standards. However, the meeting turned out to be less about the reasons for Duke Energy's policy and more about Fibertech's rigid demands to be accommodated according to its own preferences, notwithstanding Duke Energy's policy.
- the meeting) presenting the proposed standards that Fibertech wanted Duke Energy to implement, as well as some drawings and other specifications purportedly approved by Dayton Power & Light Company and an American Electric Power Corp. operating company. Ms. Ernst then indicated that Fibertech could attach its own equipment in a manner similar to what is outlined in "Standard 2," with the exception that Fibertech—not DEI—would own the equipment. This was a critical difference, because the entire premise of "Standard 2" was Duke Energy ownership of the facilities. The only circumstance under which Duke Energy was willing to consider pole-mounted cabinets and other pole-mounted enclosures (other than extraordinary circumstances such as a municipality prohibiting pad/pedestal mounted equipment in the right-of-way) was if the facilities were owned and completely controlled by Duke Energy.

- At the meeting, I conveyed to Fibertech that DEI's preference was that Fibertech mount its cumbersome equipment on a pad or pedestal in the right-of-way ("Standard 1"). Different utilities have different preferences/tolerances on this issue, but based on my experience, the preferred practice is mounting most such ancillary equipment on pads/pedestals in the right-of-way (not mounting them to the poles). For example, I understand that Indianapolis Power & Light Company ("IPL") (whose service area is contiguous to DEI's service area) requires that equipment cabinets, amplifiers, power supplies, and meter bases be located off-pole and in the right-of-way. I also understand that Fibertech and other carriers have successfully deployed small cell antenna under standards similar to Duke Energy's standards in IPL's service area, as well as in other service areas. Pad or pedestal mounted equipment (and/or equipment cabinets) situated in the right-of-way is common in Duke Energy's service areas. Attached hereto as Attachments 2-A, 2-B, 2-C, and 2-D are photographs depicting pad/pedestal mounted equipment boxes currently in use in the territories of Duke Energy Ohio, Inc., Duke Energy Florida, Inc., DEP, and DEC, respectively.
- Although the starting point for an agreement under "Standard 2" would have been similar to the Master Distribution Wireless Equipment Agreement that Duke Energy sent to Fibertech in January 2014 in connection with Fibertech's interest in small cell deployment in Ohio and Kentucky, the parties never advanced from square one because Fibertech was never interested in pursuing this option. From my perspective, Fibertech's only interest in this arrangement was finding a way to use it against Duke Energy. This experience unfortunately has left me and others at Duke Energy feeling "gun-shy" about thinking "outside the box" or beyond company standards in an effort to accommodate the evolving preferences of third-party attachers.

- Ms. Ernst also claimed at the May 22, 2014 meeting that some municipalities actually want Fibertech to place its equipment on existing poles rather than in the right-of-way, but she never actually identified these purported municipalities—despite Duke Energy's request that she do so. When we asked Fibertech whether any municipalities actually prohibited equipment in the right-of-way, Fibertech's response was only that such an inquiry was either irrelevant or missed the point. DEI's experience with the cities in its service area has been the exact opposite—i.e., the cities are either agnostic on the location of such equipment or actually prefer that it be pad/pedestal mounted in the right-of-way.
- 19) At the end of the meeting, I reiterated what Duke Energy's current standards were, but also noted that I would forward Fibertech's proposed standards to our Standards team for review. There was no meaningful back-and-forth conversation on Duke Energy's standards. Fibertech simply demanded that it be accommodated pursuant to its preferred standards.
- Pursuant to Fibertech's written request, an executive-level meeting between Fibertech and DEI was held on August 4, 2014 at DEI's headquarters in Plainfield, Indiana. Karol Mack, Robert Sipes, Russ Atkins, Eric Langley (outside counsel), and I attended the meeting, and we did so on behalf of DEI—and only DEI. Though some of the same personnel would have staffed a similar meeting on behalf of DEC and/or DEP, at least one critical team member would have been different. The job responsibilities of Russ Atkins, Vice-President—Engineering, are tied to Indiana and the Midwest, but not to the Carolinas. My organization reports to Robert Sipes, which is why Mr. Sipes (as Vice President) was involved.
- 21) At the beginning of the August 4, 2014 meeting, the parties agreed that communications would be deemed confidential, protected settlement communications. Duke Energy expected that such meeting communications and discussions would be kept

confidential—especially in regards to the parties' discussion of an idea where Fibertech's equipment would be attached to a "bracket" (and in regards to the related, further communications on the need for continued discussions concerning the financial consideration under such an idea). Fibertech itself even later referred to the bracket idea as a "settlement proposal" in a September 25, 2014 email. At the meeting on August 4, Fibertech stated that its preferred equipment could not be placed inside an equipment cabinet due to heat dissipation and that placing its preferred equipment inside a cabinet would void manufacturer warnings. DEI inquired as to whether there were other suitable pieces of equipment available in the marketplace that could be placed inside an equipment cabinet, but Fibertech never answered this question.

- The executive-level meeting did not result in a resolution of the issues between the parties. As far as I could tell, Fibertech never seriously considered whether it could deploy under Duke Energy's standards.
- Fibertech also had approached DEC and DEP regarding attachment agreements, but the real substance of those processes did not take place until after the August 4, 2014 meeting. As to DEC, in mid-July 2014, Fibertech requested copies of DEC's wireline and wireless attachment agreements. On July 30, 2014, Theresia Elliott, Senior Joint Use Specialist with Duke Energy, sent copies of DEC's templates of both its wireline agreement and wireless agreement to Judy Newkirk of Fibertech. Attached hereto as Attachment 3 is a true and correct copy of Ms. Elliott's email to Ms. Newkirk dated July 30, 2014. On August 18, 2014, Frontier sent a redlined draft of the DEC wireline agreement to DEC. Attached hereto as Attachment 4 is a true and correct copy of Ms. Newkirk's (on behalf of Fibertech) email to Ms. Elliott (on behalf of DEC) dated August 18, 2014. On November 11, 2014, Frontier executed the wireline agreement, and Fibertech sent the executed agreement to DEC via cover letter dated November

- 11, 2014. Attached hereto as Attachment 5 is a true and correct copy of Fibertech Deputy General Counsel James Hoare's cover letter to Ms. Elliott (on behalf of DEC) dated November 11, 2014. Between August 18, 2014 and November 11, 2014, Fibertech contacted DEC only once regarding the status of the agreement (via a phone call from Ms. Newkirk to Ms. Elliott, which occurred sometime in September or October 2014). Although Fibertech executed the DEC wireline agreement, it did not execute the DEC wireless agreement. To date, DEC had not received from Fibertech any redlined drafts, emails, telephone calls, or other communications concerning the wireless agreement. In regards to DEP, on June 25, 2014, DEP provided templates for both its wireless and wireline agreements to Fibertech. Attached hereto as Attachment 6 is a true and correct copy of Debbie Perry's (who is a Sr. Joint Use Specialist with DEP) email to Ms. Newkirk dated June 25, 2014. On November 10, 2014, Fibertech sent an executed wireline agreement to DEP (via cover letter). Attached hereto as Attachment 7 is a true and correct copy of Ms. Newkirk's (on behalf of Fibertech) letter to Ms. Perry (on behalf of DEP) dated November 10, 2014. In that letter, Frontier stated that the required deposit was being paid "under protest," because DEP had denied Frontier's request to submit a bond agreement in lieu of a cash deposit or letter of credit (as per DEP policy). Although Fibertech executed the DEP wireline agreement, Fibertech never executed the DEP wireless agreement. To date, DEP had not received from Fibertech any redlined drafts, emails, telephone calls, or other communications with questions or comments concerning the wireless agreement.
- 24) Fibertech has never submitted an application for a wireless antenna attachment anywhere in Duke Energy's service areas.
- 25) Fibertech has never contended that Duke Energy's standards serve as an actual barrier to deployment, despite inquiry from Duke Energy on this issue.

26) Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true and correct to the best of my knowledge, information, and belief.

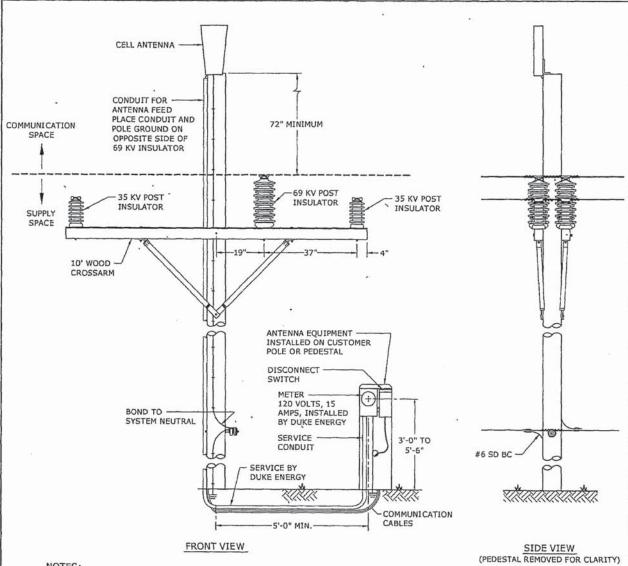
Executed on the 17th day of December, 2014.

Scott Freeburn

Joint Use & Tower Leasing Manager

Duke Energy Corporation

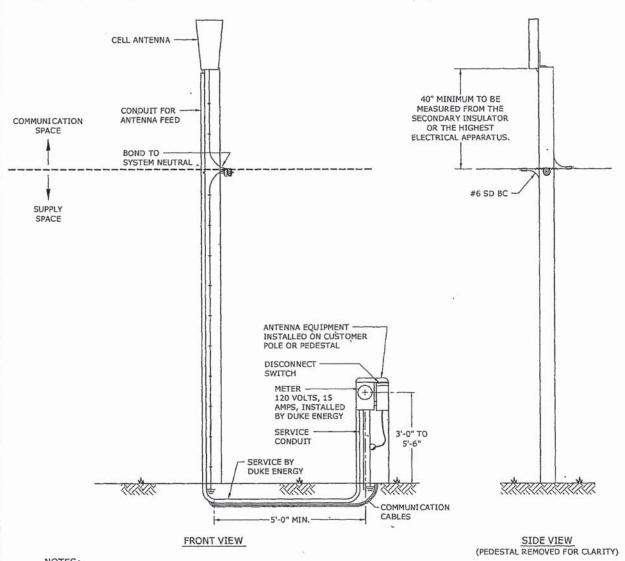
ATTACHMENT 1



- 1. ANTENNA MUST BE INSTALLED BY AN APPROVED CONTRACTOR QUALIFIED TO WORK IN THE SUPPLY SPACE.
- POLE LOCATIONS APPROVED BY DUKE ENERGY. DO NOT INSTALL ANTENNA ON EQUIPEMENT POLES SUCH AS CAPACITOR BANKS, RECLOSERS, SWITCHES, U.G. DIP, ETC.
- , 3. ONLY ONE ANTENNA PER POLE ALLOWED.
- 4. <u>CAUTION</u>: DISCONNECT POWER TO ANTENNA BEFORE WORKING ON POLE IN AREA ABOVE RF WARNING SIGN. CALL JOINT USE UNIT TO COORDINATE DISCONNECTION WITH TELECOM COMPANY, <u>EXCEPT IN CASE OF EMERGENCY</u>.
- A MINIMUM CLASS 3 POLE IS REQUIRED. IF POLE EXCEEDS 60' ABOVE GROUND, CONTACT DISTRIBUTION STANDARDS FOR STRENGTH AND LOADING ANALYSIS.
- 6. ANTENNA OWNER MUST INSTALL AN RF WARNING SIGN ON THE POLE AT THE LEVEL WHERE THE SAFE APPROACH DISTANCE ENDS FOR FCC GENERAL POPULATION/ UNCONTROLLED CLASS LIMITS. WARNING SIGN "WARNING ANTENNA RADIATION. MINIMUM APPROACH DISTANCE IS X_FT."
- 7. ALL ANTENNA DESIGNS MUST BE APPROVED BY DISTRIBUTION ENGINEERING.
- THE ONLY ANTENNA EQUIPMENT PERMITTED ON THE POLE IS THE ANTENNA, THE CABLE FEEDING THE ANTENNA AND THE CABLE FEEDING THE AMPLIFIER IN THE PEDESTAL.

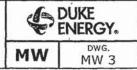
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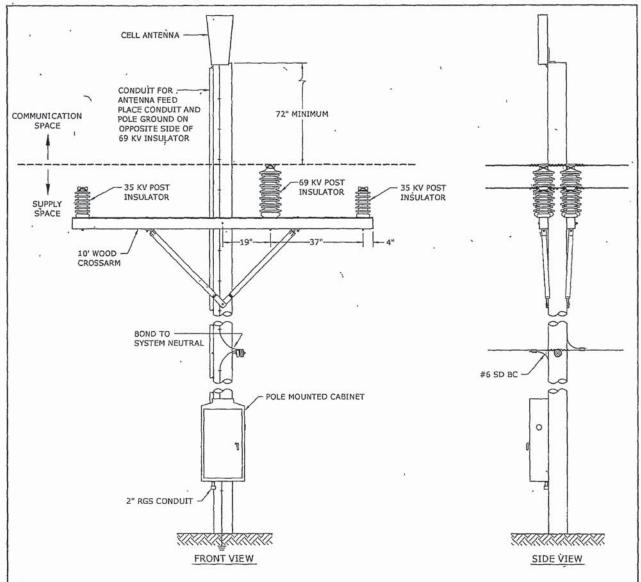




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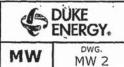
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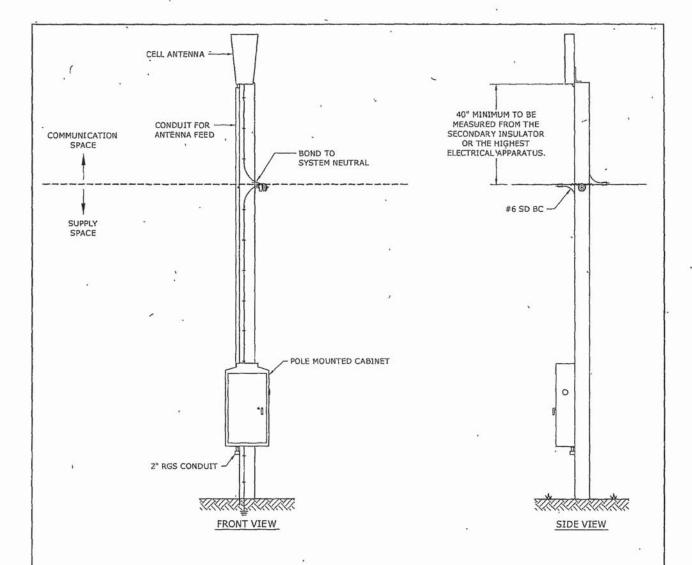




- 1. ANTENNA MUST BE INSTALLED BY AN APPROVED CONTRACTOR QUALIFIED TO WORK IN THE SUPPLY SPACE.
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- 3. ONLY ONE ANTENNA PER POLE ALLOWED.
- 4. CAUTION: DISCONNECT POWER TO ANTENNA BEFORE WORKING ON POLE IN AREA ABOVE RF WARNING SIGN.
 CALL JOINT USE UNIT TO COORDINATE DISCONNECTION WITH TELECOM COMPANY, EXCEPT IN CASE OF
 EMERGENCY.
- A MINIMUM CLASS 3 POLE IS REQUIRED. IF POLE EXCEEDS 60' ABOVE GROUND, CONTACT DISTRIBUTION STANDARDS FOR STRENGTH AND LOADING ANALYSIS.
- 6. ANTENNA OWNER MUST INSTALL AN RF WARNING SIGN ON THE POLE AT THE LEVEL WHERE THE SAFE APPROACH DISTANCE ENDS FOR FCC GENERAL POPULATION/ UNCONTROLLED CLASS LIMITS. WARNING SIGN -"WARNING - ANTENNA RADIATION. MINIMUM APPROACH DISTANCE IS X FT."
- 7. ALL ANTENNA DESIGNS MUST BE APPROVED BY DISTRIBUTION ENGINEERING.

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- 1. ANTENNA MUST BE INSTALLED BY AN APPROVED CONTRACTOR QUALIFIED TO WORK IN THE SUPPLY SPACE.
- 2. POLE LOCATIONS APPROVED BY DUKE ENERGY. **DO NOT** INSTALL ANTENNA ON EQUIPEMENT POLES SUCH AS CAPACITOR BANKS, RECLOSERS, SWITCHES, U.G. DIP, ETC.
- 3. ONLY ONE ANTENNA PER POLE ALLOWED.
- 4. <u>CAUTION:</u> DISCONNECT POWER TO ANTENNA BEFORE WORKING ON POLE IN AREA ABOVE RF WARNING SIGN. CALL JOINT USE UNIT TO COORDINATE DISCONNECTION WITH TELECOM COMPANY, <u>EXCEPT IN CASE OF EMERGENCY</u>.
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 APPROACH DISTANCE ENDS FOR FCC GENERAL POPULATION/ UNCONTROLLED CLASS LIMITS. WARNING SIGN "WARNING ANTENNA RADIATION. MINIMUM APPROACH DISTANCE IS X_FT."
- 7. ALL ANTENNA DESIGNS MUST BE APPROVED BY DISTRIBUTION ENGINEERING.

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ATTACHMENT 2A



ATTACHMENT 2B



ATTACHMENT 2C



ATTACHMENT 2D



ATTACHMENT 3

From: Elliott, Theresia Karen

Sent: Wednesday, July 30, 2014 10:57 AM To: Newkirk, Judy

To: Newkirk, Judy Subject: RE: Fibertech

Judy,

Attached are the two templates for the agreements that we are currently using in the Legacy Duke area. Let me know if you have any questions.

Theresia Elliott

Sr. Joint Use Facilities Specialist Duke Energy Charlotte, NC 28202 Phone (704) 382-6384 Cell (704) 609-9213

From: Newkirk, Judy [mailto:jnewkirk@fibertech.com]

Sent: Wednesday, July 30, 2014 9:19 AM

To: Elliott, Theresia Karen **Subject:** FW: Fibertech

*** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ***

Theresia
This is what Debbie sent me.
Thanks
Judy

Judy Newkirk
Director of Regulatory Affairs and Compliance
Fiber Technologies Networks, L.L.C.
300 Meridian Centre
Rochester, New York 14618
Office Phone: 585-568-8485

Fax: 585-442-8845

From: Perry, Debbie [mailto:Debbie.Perry@duke-energy.com]

Sent: Wednesday, June 25, 2014 2:23 PM

To: Newkirk, Judy Subject: Fibertech

Judy,

The Duke Distribution Zones pdf shows the combined Duke Energy service areas. There are 2 areas that are not correct on the Carolinas map. You will see a line drown down the center of the state. The right side is legacy Progress with the exception of the Northwest area. It is still managed by Legacy Duke out of Charlotte. Legacy Duke is on the left side of the state with the exception of the West area. It is still managed by Legacy Progress.

Please let me know if you have any questions.



Debbie Perry

Sr. Joint Use Specialist 410 S Wilmington Street – NC 4 Raleigh, NC 27601 919-546-3297

debbie.perry@duke-energy.com

This email has been scanned for spam and viruses by the MessageLabs Email Security System. For all email inquiries, please submit a ticket to the IT Helpdesk: <u>ithelpdesk@fibertech.com</u>

ATTACHMENT 4

From:

Newkirk, Judy <jnewkirk@fibertech.com>

Sent:

Monday, August 18, 2014 3:20 PM

To:

Elliott, Theresia Karen

Subject: Attachments: Red-Line Duke Energy Carolinas LLC Telecommunication Pole Attachment Agreement

Red-Line Duke Energy Carolina Telecom Pole Attachment Agreement 8-18-14.doc

Follow Up Flag:

Follow up

Flag Status:

Flagged

*** This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected email. ***

Theresia,

Attached is a red-line version of the pole attachment agreement you sent me. If you have any questions concerning our requested changes, please let me know.

Thanks for your help.

Judy

Judy Newkirk
Director of Regulatory Affairs and Compliance
Fiber Technologies Networks, L.L.C.
300 Meridian Centre
Rochester, New York 14618
Office Phone: 585-568-8485

Fax: 585-442-8845

ATTACHMENT 5



phone 585-697-5100 fax 585-442-8845 300 Meridian Centre Rochester, NY 14618

November 11, 2014

Ms. Theresia Elliott – Mail Code EC10Q Duke Energy 526 South Church Street Charlotte, NC 28202

Dear Ms. Elliott:

I have enclosed two executed copies of the Duke Energy form pole attachment agreement. I have also enclosed a check for \$250 (134395) as required by the Duke Energy for the "Agreement Fee" and another check for \$25,000 (134394) as required by section 1.25. The pole attachment agreement is executed under protest, and the checks are included under protest.

On August 18, 2014, Fibertech proposed reasonable changes to Duke Energy's form agreement. Rather than negotiate, Duke Energy delayed. Despite follow up emails and telephone inquiries, and the passage of nearly three months, Duke Energy has not responded to Fibertech's proposed changes to the agreement. Notably, the requirement of a security deposit is unreasonable.

As indicated in the proposed changes to the agreement, Fibertech is willing to furnish a bond to secure its obligations under the agreement, which would adequately protect Duke Energy from any default under the agreement. Nevertheless, as Fibertech must begin construction of its network, it must sign the agreement under protest. If Duke Energy is willing to accept a bond in lieu of the deposit, please let us know, and we can make the appropriate arrangements. Similarly, if Duke Energy wishes to negotiate reasonable terms as proposed by Fibertech in August, we can negotiate an amendment to the executed agreement.

Sincerely,

James Hoare

Deputy General Counsel

ATTACHMENT 6

From:

Perry, Debbie < Debbie.Perry@duke-energy.com>

Sent:

Wednesday, June 25, 2014 1:23 PM

To:

jnewkirk@fibertech.com

Subject:

Fibertech

Attachments:

Fiber Agreement-DEP.doc; Wireless Telecom Agreement Template 2014.docx; JU Clearance dwg.#09.04-14.dwf.pdf; Exhibits C D E.pdf; Duke_Distribution_Zones.pdf

Judy,

The Duke Distribution Zones pdf shows the combined Duke Energy service areas. There are 2 areas that are not correct on the Carolinas map. You will see a line drown down the center of the state. The right side is legacy Progress with the exception of the Northwest area. It is still managed by Legacy Duke out of Charlotte. Legacy Duke is on the left side of the state with the exception of the West area. It is still managed by Legacy Progress.

Please let me know if you have any questions.



Debbie Perry

Sr. Joint Use Specialist 410 S Wilmington Street – NC 4 Raleigh, NC 27601 919-546-3297

debbie.perry@duke-energy.com

ATTACHMENT 7



November 10, 2014

phone 585-697-5100 fax 585-442-8845 300 Meridian Centre Rochester, NY 14618

VIA FEDERAL EXPRESS

Debbie Perry Sr. Joint Use Specialist 410 S. Wilmington Street – NC 4 Raleigh, NC 27601

RE: Pole Attachment Agreement/Duke Energy Progress, Inc.

Dear Ms. Perry:

Enclosed please find:

- Two (2) executed copies of the Pole Attachment Agreement between Duke Energy Progress, Inc. and Fiber Technologies Networks, L.L.C. ("Fibertech").
- · Fibertech's Certificate of Liability Insurance.
- Check No. 134388 for twenty five thousand dollars and no cents (\$25,000) for a deposit, as required by Section 6.4 of the Agreement.

The payment of the deposit is under protest, as such a requirement is unreasonable. Fibertech is willing to furnish a bond to secure its obligations under the agreement, which would adequately protect Duke Energy Progress, Inc. from any default under the agreement. Nevertheless, as Fibertech must begin construction of its network, it must accede to Duke Energy Progress, Inc.'s requirement. If Duke Energy Progress, Inc. is willing to accept a bond in lieu of the deposit, please let us know, and we can make the appropriate arrangements.

Please return one fully executed copy of the Agreement for our records.

Thank you for your assistance.

Very Truly Yours,

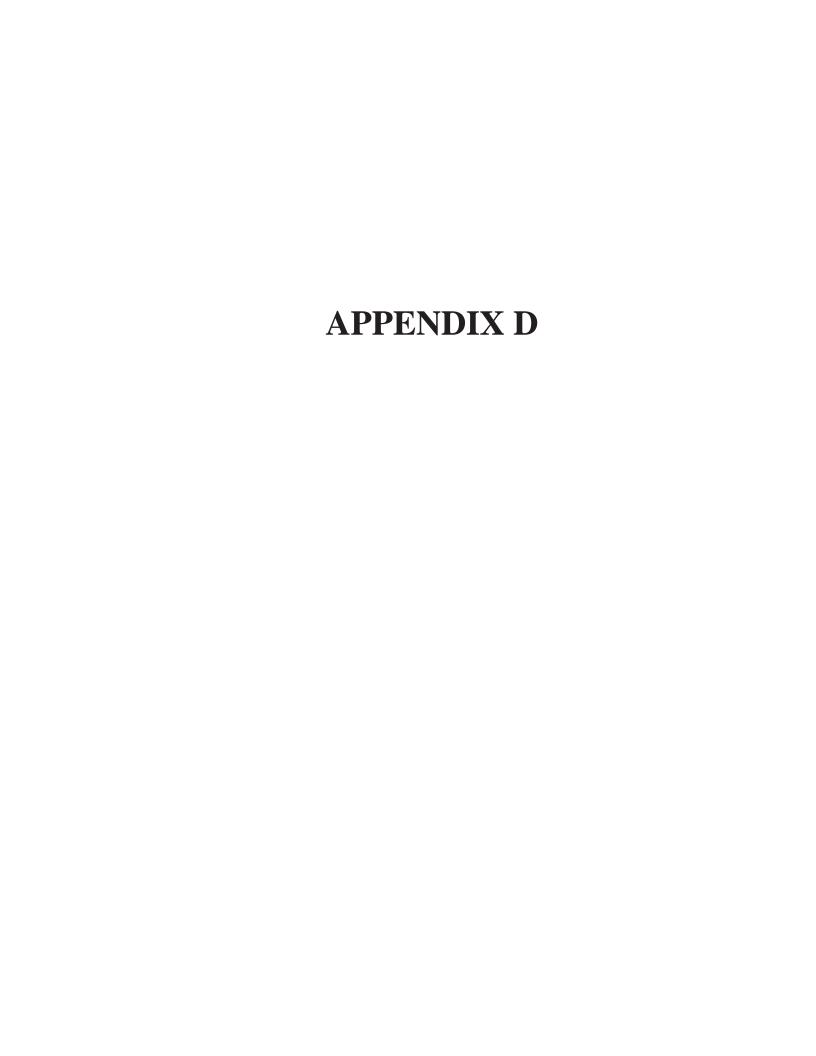
Judith A. Newkirk

Director of Regulatory Affairs &

Compliance

(585) 568-8485 (Phone)

JAN/yf Enclosures



Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

Fiber Technologies Networks, L.L.C.,	
Complainant,)
v.	Proceeding No. 14-227
Duke Energy Indiana, Inc.; et al.,) File No. EB-14-MD-01
Respondents.)
respondents.)

DECLARATION OF ROBERT SIPES

- Energy Corporation ("Duke Energy") (the parent corporation of Duke Energy Indiana, Inc. ("DEI"), Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, Inc. ("DEP")). My job duties currently include overseeing all aspects of business services in support of Duke Energy's transmission, distribution, and gas operations. Duke Energy's Joint Use & Tower Leasing department, including but not limited to Mr. Scott Freeburn (the Joint Use & Tower Leasing Manager for Duke Energy), report to me. My job duties involve relationships in Indiana, Ohio, Kentucky, North Carolina, South Carolina, and Florida. I have held this position of Vice-President—Business Services for Duke Energy since November 2014.
- 2) Prior to holding my current position, I was the Vice-President—Customer Operations Services. I was named to this position in October 2012, shortly after finalization of the merger between Duke Energy Corporation and Progress Energy, Inc. This role was very similar to my current role, and my position was retitled as a result of a recent reorganization.

- 3) Prior to holding the Vice-President—Customer Operations Services position, I was the Vice-President—Distribution for Progress Energy, Inc. ("Progress"). I held that position from May 2009 until July 2012. As Vice-President—Distribution for Progress, my responsibilities included overseeing central distribution engineering and operations services.
 - 4) I have worked in the electric utility industry for thirty-one (31) years.
- 5) I hold a Bachelor's degree, Electrical and Electronics Engineering from the North Carolina State University. The facts set forth in this declaration are based on my personal knowledge, or knowledge available to me in my capacity as the Vice-President—Business Services for Duke Energy.
- 6) I have read and am familiar with the Pole Attachment Complaint filed by Fiber Technologies Networks, L.L.C. ("Fibertech") in the above-captioned proceeding, and I am otherwise familiar with the facts and circumstances giving rise to and at issue in this proceeding.
- 7) At the time Fibertech first approached us about small cell antenna attachments, Duke Energy had two standards in place for such attachments. The preferred standard ("Standard 1") required that certain ancillary equipment enclosures be mounted off-pole on a pad or pedestal in the right of way. This was consistent with the standards Progress Energy had used as far back as I can remember.
- The second standard ("Standard 2") was developed by Duke Energy in 2013 as a result of a request posed to Duke Energy by another carrier, in which that other carrier urged Duke Energy to consider a configuration under which the equipment required to be pedestal-mounted in the right-of-way could somehow be located on the pole. With hesitation and reluctance, Duke Energy agreed to consider the carrier's request in the interest of promoting cooperation and small cell deployment. "Standard 2" was always premised entirely on Duke

Energy's ownership of the facilities that would have been mounted to its poles. No equipment and/or facilities were ever installed or otherwise attached to any of Duke Energy's poles pursuant to "Standard 2."

- 9) Due in part to our ultimately well-founded reluctance and hesitation in initially considering "Standard 2," as well as because of Fibertech's unfavorable response to "Standard 2," Duke Energy since has withdrawn "Standard 2." In consultation with members of my staff as well as peers within the various operating companies, I made the final decision to withdraw this standard. At the time of such withdrawal, neither Fibertech nor any other entity had requested access under "Standard 2."
- 10) "Standard 2" contemplated accommodating third-party attachers in a manner beyond Duke Energy's customary policy and comfort zone, in that "Standard 2" would have allowed ancillary equipment to be housed in cabinets mounted to Duke Energy's poles (rather than in cabinets situated in the right-of-way, as is contemplated by "Standard 1"). Under "Standard 2," Duke Energy would have retained ownership of the equipment cabinets mounted to its poles.
- In hindsight, Duke Energy never should have even contemplated accommodating third-party attachers in a manner beyond its policy and comfort zone. Though the other, aforementioned carrier approached this effort cooperatively and in good-faith, Duke Energy should not have lost sight of the fact that other carriers take a different, more opportunistic approach to creative thinking, particularly in a regulated context. The key to "Standard 2" was always Duke Energy ownership of the facilities and the ability to select poles on which such installations would be made and the number of such installations in any given area. These

controls were important—indeed essential—considering our concerns with pole-mounted enclosures, generally.

- 12) The fact that Fibertech now is attempting to manipulate and use Duke Energy's prior good faith effort to engage in collaborative and cooperative discussions with another carrier about potentially allowing the pole-mounting of equipment, which normally would be required to be pedestal-mounted in the right-of-way, has produced a chilling effect on Duke Energy's willingness to engage in similar discussions in the future. Duke Energy now finds itself in an unenviable and precarious situation—if Duke Energy chooses to engage in such good-faith, collaborative discussions in the future, then it potentially is opening itself up to exposure in future pole attachment dispute actions like the proceeding here.
- 13) Fibertech never even proposed a different pricing model under the erstwhile "Standard 2." And again, no carrier ever deployed under "Standard 2," so there are no means in which to estimate the ultimate cost to be paid to Duke Energy by the attaching carrier. From my perspective, Fibertech's focus on the pricing issue in its complaint is a red-herring because the parties, as far as I am aware, never reached the point of discussing price. Fibertech, to my knowledge, was never interested in pursuing deployment under "Standard 2."
- There are numerous safety, reliability, and engineering reasons for Duke Energy's current standards. In addition to determining what is best practice for any particular pole, Duke Energy also must think broadly about the entire distribution system and the cumulative effect of any pole-specific decision. While Fibertech only has to think about a single pole (or a small group of poles), Duke Energy does not have that luxury. Duke Energy's decisions must account for both the long and short view, as well as pole specific and systemic impact. Duke Energy's decision to withdraw "Standard 2" did not constitute an about-face in its policy from allowing to

disallowing cumbersome equipment attachments beneath the communications space. The change, as it relates to DEI and DEC, is a result of bringing uniformity to the operating standards among the various post-merger operating companies. Moreover, DEP's standards on this issue—i.e., requiring equipment cabinets be placed in the right-of-way absent extenuating circumstances—have been consistent for more than 30 years.

Atkins, who is the Vice President—Engineering for DEI, also attended that meeting. Mr. Atkins's responsibilities include overseeing the aspects of utility power engineering management services for DEI. In other words, Mr. Atkins's department has the final word on any matters relating to distribution engineering in Indiana. Mr. Atkins's job responsibilities relate to Indiana and the Midwest (but not to North Carolina or South Carolina). Though in my role as Vice-President—Business Services for Duke Energy, I likely would have attended any executive-level meeting on similar issues for DEC and DEP, Mr. Atkins's counterparts in DEC and DEP would have needed to be present, as well.

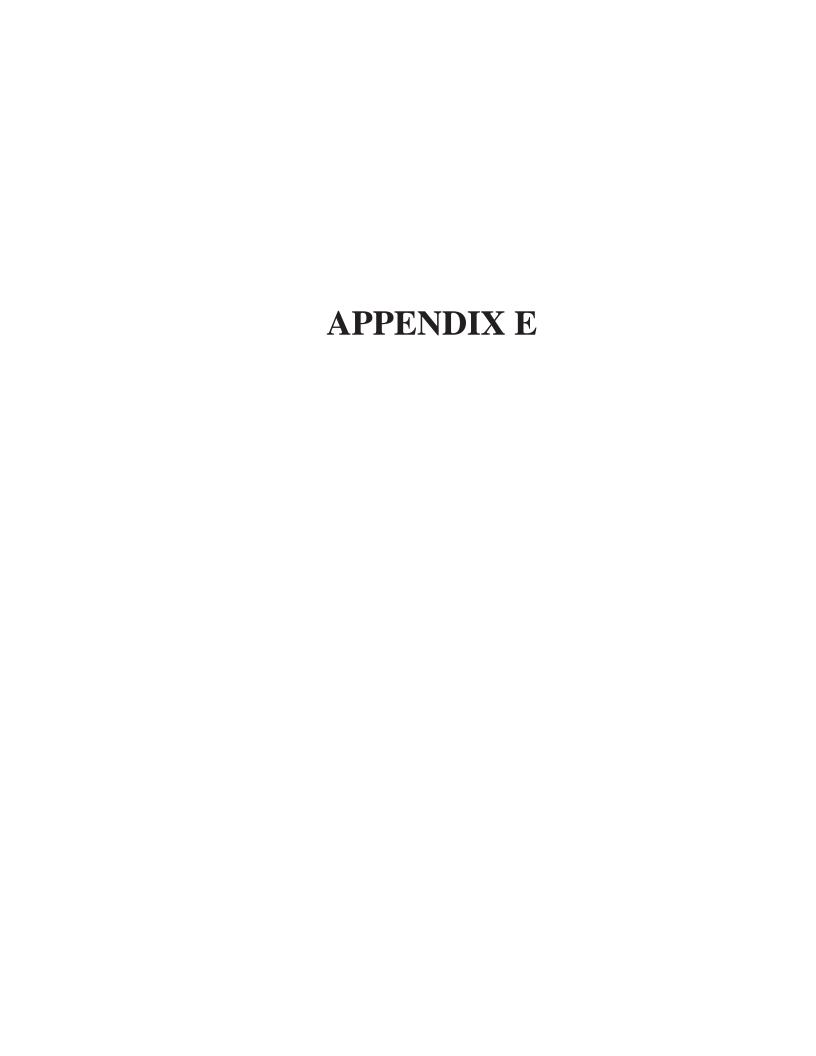
16) Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true and correct to the best of my knowledge, information, and belief.

Executed on the 17th day of December, 2014.

Robert Sipes

Vice-President—Business Services

Duke Energy Corporation



Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

Fiber Technologies Networks, L.L.C.,	
Complainant,	
v.) Duke Energy Indiana, Inc.; et al.,)	Proceeding No. 14-227 File No. EB-14-MD-015
Respondents.	
,)	

DECLARATION OF EWELL TIMOTHY ROBESON

- 1) My name is Ewell Timothy Robeson. I am an independent contractor working in the field of Distribution Design and Construction Standards for Duke Energy Corporation ("Duke Energy") (the parent corporation of Duke Energy Indiana, Inc. ("DEI"), Duke Energy Carolinas, LLC ("DEC"), and Duke Energy Progress, Inc. ("DEP")). My job duties currently include consulting on all matters relating to Overhead and Underground Distribution Line Designs and Material Standards. I have held this contractor position since January 2013.
- 2) In 1970, I joined Carolina Power & Light ("CPL"), predecessor to Progress Energy, Inc. ("Progress"), as a Junior Engineer. I transitioned into CPL's corporate office in 1973, working as the Underground Distributions Design Engineer—Standards division. In the mid-1980s through the mid-1990s, I managed the Distribution standards division. I was working as a Lead Engineer for overhead and underground design standards when CPL became Progress via CPL's merger with Florida Power Corp. in 2000. I likewise continued in my position as Lead Engineer for overhead and underground design standards—Standards division, with Duke Energy after the merger between Duke Energy and Progress in July 2012. I retired from my

position as Lead Engineer for overhead and underground design—Standards division in December 2012, but as noted above, I have since worked for Duke Energy as an independent contractor in the field of Distribution overhead and underground design. As the Manager—Standards division for CPL and later as a Lead Engineer for Progress, my responsibilities over joint use and pole attachment standards were similar to my managerial position with Duke Energy, with the exception that my managerial position with Duke Energy encompassed a broader geographic area (i.e., Indiana, North Carolina, South Carolina, Ohio, Kentucky, and Florida) than my former position.

- I hold a Bachelor of Science degree in Electrical Engineering from the North Carolina State University. I am a Professional Engineer licensed in North Carolina, South Carolina and Florida. I have been involved with the National Electric Safety Code (the "NESC") over the past thirty years in the roles of Alternate, then Principal, member Subcommittee 2 on Grounding, and then later as Principal member of Subcommittee 7, Underground Lines. Over the past five years, I have served as an Executive on the Board of Directors for the NESC. I am presently serving as the Secretary of the NESC's Grounding Committee, a position I have held since 1997. Additionally, I previously served as Chairman of the Edison Electric Institute's NESC committee from 1997 until 2012. In 2013, I served as an NESC Consultant to the Edison Electrical Institute. I also am a member of the NESC Interpretations Committee. I have offered testimony on matters relating to distribution standards in numerous court and regulatory proceedings.
- 4) The facts set forth in this declaration are based on my personal knowledge, or knowledge available to me in both my prior and current capacities with Duke Energy, as well as in my prior capacities with CPL and Progress.

- 5) I have read and am familiar with the Pole Attachment Complaint filed by Fiber Technologies Networks, L.L.C. ("Fibertech") in the above-captioned proceeding, and I am otherwise familiar with the facts and circumstances giving rise to and at issue in this proceeding.
- As indicated above, Duke Energy and Progress finalized their merger in July 2012. During the merger integration process, the distribution standards teams from both companies gave careful attention to developing consistent, enterprise-wide standards, including but not limited to standards relating to attachment of communications facilities. One of the specific standards that we addressed related to the installation of ancillary equipment (such as the equipment at issue here) to Duke Energy's utility poles. The goal was to develop consistent standards and policies throughout the services areas of the now combined companies, recognizing that local considerations may drive the application of any given standard in any given situation. In other words, extenuating circumstances aside, Duke Energy does not want one set of standards applied to the north side of a street, with another set of standards being applied to the south side of the same street.
- 7) At the time of the merger, Progress (which is the entity now known as DEP) operated under a decades-old standard that required certain ancillary telecom equipment be pad/pedestal mounted in the right-of-way. The pre-merger Duke Energy Corporation companies (which were themselves the result of several mergers) had taken a different approach to this issue, in that they generally allowed for a few items such as meter bases and some power supplies to be mounted on the pole (instead of in the right-of-way). In weighing the two approaches, the distribution standards merger integration team sought field input from all of the operating companies, and ultimately decided that the best practice for the combined companies was the decades-old Progress standard.

- As of July 2012 (i.e., the date of the merger), the Progress standard thus became the applied standard going forward for the merged companies. Attached to this Declaration as Attachment 1 is a true and correct copy of the standard that was adopted by the combined companies. To date, I am unaware of any significant complaints or push back levied by other joint users or third-party attachers (i.e., other than Fibertech here) regarding Duke Energy's standard.
- 9) The applied, written standards attached hereto at Attachment 1 govern and control the types of equipment that may be attached to Duke Energy's poles (whether attached by a Duke Energy-affiliated company or an unrelated entity such as Fibertech). And as set forth in Attachment 1 at note 8, in addition to the antenna, Duke Energy's standards also specifically permit the attachment of "the cable feeding the antenna and the cable feeding the amplifier in the pedestal."
- Although the NESC does not specifically address whether ancillary equipment, such as equipment boxes, meter bases, power supplies, or battery backups, should be mounted on the pole versus mounted on a pedestal or pad in the right-of-way, it does have specific pole clearance requirements for mounting cabinets, boxes, conduits, wires, and cable to ensure there is adequate ground clearance, space between items mounted on the pole, climbing space, and working space. When ancillary equipment is mounted on an adjacent pad or pedestal next to the electric utility's pole, NESC Rule 234B1a requires a horizontal separation of a minimum of five (5) feet (i.e., the pad or pedestal must be located at least 5 feet from the pole). Where the NESC is silent on whether the equipment should be mounted on a pad/pedestal in the right-of-way versus mounted on a pole, the prevailing view is that the decision should rest with the pole owner, but that the decision should be consistent within a given area (for purposes of

predictability and work practices, among other reasons). Further, the NESC is generally viewed as a baseline safety standard. It is not a construction standard and utilities often adopt standards that exceed the NESC requirements.

- Duke Energy's standards do not prohibit all types of pole-mounted equipment. The standards merely restrict the type of ancillary equipment that can be pole-mounted beneath the communications space on a Duke Energy pole. This is not an uncommon practice unique to Duke Energy.
- 12) All construction standards serve as some limitation on attachment techniques, locations, or types. For example, most electric utilities have standards that require 12" of separation between communications attachments. Similarly, most utilities require that communications attachments be bonded to the utilities' grounding systems.
- 13) One of the reasons for Duke Energy restricting the type of ancillary equipment that can be pole-mounted is that unlike Fibertech, Duke Energy must account for the cumulative effect that any practice has on Duke Energy's utility pole infrastructure as a whole. Cabinets and equipment mounted on poles add additional wind and ice loading to the pole, which must be evaluated and accounted for in providing structure strength required to meet NESC strength and loading requirements. This can be evaluated, and pole strengths increased, on initial request, but in our experience, joint use companies have increased cabinet sizes and subsequently added equipment and cables without Duke Energy's knowledge. This has placed Duke Energy's structures in jeopardy of not meeting NESC Strength and Loading requirements.
- 14) Another reason for the restriction is the detrimental effects that pole-mounted equipment cabinets have from an operational and reliability standpoint. CPL (and then Progress, post-merger) has always had specific published standards that allocate pole quadrants for both

company and joint-user (e.g., telephone and cable television ("CATV")) use. Standards (generally based on NESC requirements) for vertical and horizontal spacing of equipment, conduits, through bolts, and cables have been published and maintained by the company. Some joint-use companies do not have engineering staff and installers who have the requisite expertise to properly interpret and follow the company standards, which has resulted in pole failures, pole congestion, and encapsulation of the pole to the point where the company could not use its poles for underground service dips and equipment. This lack of the requisite expertise held by joint-use companies, as well as their previously increasing cabinet sizes and adding equipment and cables without Duke Energy's knowledge, motivated Duke Energy's decision to qualify its since withdrawn "Standard 2" as still requiring Duke Energy ownership of the facilities to be attached. "Standard 2" would only work if there was Duke Energy ownership; further, Duke Energy needed to be able to choose those poles to which the facilities would be attached and the total amount of such attachments in a particular area.

safety. Prior to the introduction of CATV, the only joint-users on electric utility poles were telephone companies and Department of Transportation ("DOT") cables (mostly at intersections). When CATV first came on the scene, with CATV cable along with some small amplifiers (mostly in line), the advent of CATV presented no problems to the electric utility. Later, as demand for service grew, the CATV companies added cabinets housing backup batteries with chargers to the pole. Initially, the electric utility provided unmetered service to these installations. As demand continued to grow, however, these cabinets became larger in size and more batteries were installed; thus metered electric service had to be implemented by the electric utility. Along with the metering came a code requirement for a service disconnect to be

installed. By this time, the poles now contained cabinets with amplifiers, cabinets with batteries and chargers, and an electric meter loop with a service disconnect. Around 1982, many complaints were being received from CPL linemen about hazardous installations, loose flexible cables left unsecured, congestion on the poles, encapsulation of the poles, and installations not meeting our joint-use standards. Concern was also expressed about the lack of climbing space and the "fall hazards" that the linemen may strike should a cutout incur while climbing on the pole. As manager of our standards group, I decided that, for the safety of CPL linemen, appropriate responsive action had to be undertaken. At the time, CPL was evaluating a combination pedestal for electric, CATV, and telephone equipment for areas with underground lines. I noticed in the relevant vendor literature the existence of a pedestal that contained a meter loop with separate compartments for communication equipment. Further research revealed that many communication companies were beginning to use such pedestals in not only in underground areas, but also in overhead line areas. My standards group proposed this pedestal service concept to CPL's joint-use group, and it was adopted as our service standard for all jointuse companies, including but not limited to the DOT. We never received any complaints about this standard. In fact, I have personally observed existing pole-mounted installations being removed from poles and upgraded using the pedestal concept.

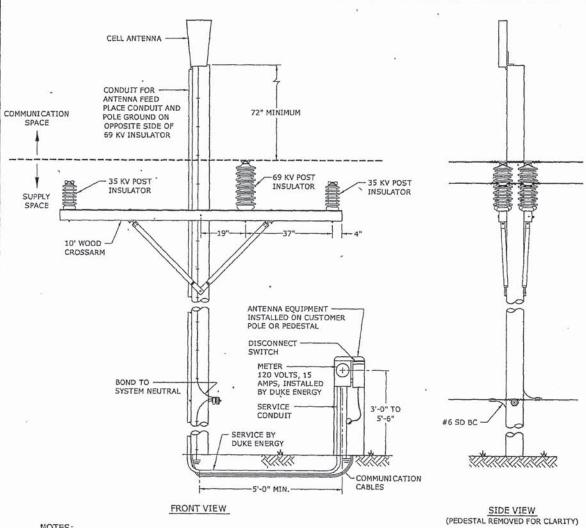
16) In its pole attachment complaint, Fibertech asserts that the equipment at issue may be (and has been by different electrical utilities) mounted to utility poles. Fibertech is technically correct that, with the proper work-around procedures on particular types of poles in particular places, the type of equipment at issue in this case can be safely mounted on any particular pole. And it can also be done, in a particular case, without significant impairment to system reliability. But the mere fact that these things can be accomplished on any particular pole does not mean

that it makes sense as a system policy. Reasonable electric utility pole owners can, and do, reach different conclusions on what is appropriate for their systems. The fact that they may reach different conclusions does not mean one of them is wrong, although it is my professional opinion that we have adopted the safest and most reliable policy possible while at the same time allowing for third party attachments. It would, of course, be safer and more reliable if there were no third party attachments our poles at all.

- 17) Regardless of the feasibility and/or reasonableness of either approach, over the past twenty years, there has been an industry-wide shift towards favoring pad/pedestal mounted equipment in the right-of-way. This shift has been driven in large part, and in addition to the cumulative, operational, and safety concerns noted above, by the fact that the equipment cabinets kept becoming larger and more cumbersome in size to the point that they posed climbing obstacles and impediments to long-term pole maintenance. For example, when equipment cabinets are pole-mounted, it in essence takes out an entire quadrant (or more) for setting replacement poles. Such pole-mounted equipment also either forecloses or complicates pole climbing by linemen, which is still a regularly employed maintenance practice even where poles are in bucket truck accessible locations. Even if a pole can be climbed by managing the complications, equipment boxes increase the risk of injury during a fall (i.e., they are "fall hazards"). Also, there are more companies making attachment to poles now than there were twenty or thirty years ago, and this has an impact on our standards.
- 18) Progress (and now Duke Energy post-merger) has maintained and applied its "pad/pedestal mounted" standard since 1982.
- 19) Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true and correct to the best of my knowledge, information, and belief.

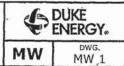
Executed on theday of December, 2014.
Ewel 7, moth Roberon PE
Ewell Timothy Robeson, PE
Contractor—Distribution Design and Construction Standards
Duke Energy Corporation

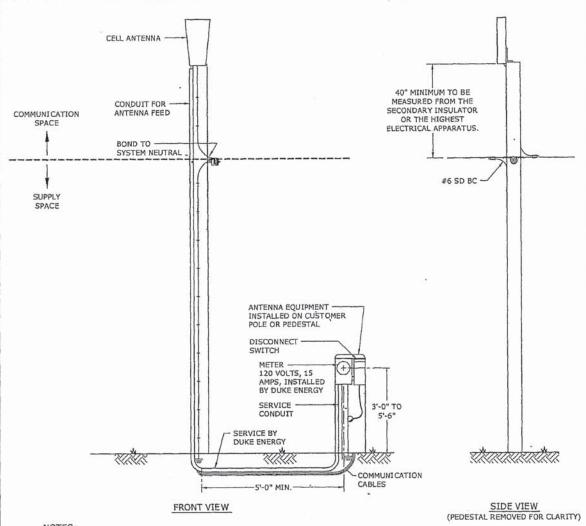
ATTACHMENT 1



- 1. ANTENNA MUST BE INSTALLED BY AN APPROVED CONTRACTOR QUALIFIED TO WORK IN THE SUPPLY SPACE.
- 2. POLE LOCATIONS APPROVED BY DUKE ENERGY. DO NOT INSTALL ANTENNA ON EQUIPEMENT POLES SUCH AS CAPACITOR BANKS, RECLOSERS, SWITCHES, U.G. DIP, ETC.
- , 3. ONLY ONE ANTENNA PER POLE ALLOWED.
- 4. CAUTION: DISCONNECT POWER TO ANTENNA BEFORE WORKING ON POLE IN AREA ABOVE RF WARNING SIGN. CALL JOINT USE UNIT TO COORDINATE DISCONNECTION WITH TELECOM COMPANY, EXCEPT IN CASE OF EMERGENCY.
- 5. A MINIMUM CLASS 3 POLE IS REQUIRED. IF POLE EXCEEDS 60' ABOVE GROUND, CONTACT DISTRIBUTION STANDARDS FOR STRENGTH AND LOADING ANALYSIS.
- 6. ANTENNA OWNER MUST INSTALL AN RF WARNING SIGN ON THE POLE AT THE LEVEL WHERE THE SAFE APPROACH DISTANCE ENDS FOR FCC GENERAL POPULATION/ UNCONTROLLED CLASS LIMITS. WARNING SIGN -"WARNING - ANTENNA RADIATION. MINIMUM APPROACH DISTANCE IS X_FT."
- 7. ALL ANTENNA DESIGNS MUST BE APPROVED BY DISTRIBUTION ENGINEERING.
- 8. THE ONLY ANTENNA EQUIPMENT PERMITTED ON THE POLE IS THE ANTENNA, THE CABLE FEEDING THE ANTENNA AND THE CABLE FEEDING THE AMPLIFIER IN THE PEDESTAL.

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- 1. ANTENNA MUST BE INSTALLED BY AN APPROVED CONTRACTOR QUALIFIED TO WORK IN THE SUPPLY SPACE.
- 2. POLE LOCATIONS APPROVED BY DUKE ENERGY. **DO NOT** INSTALL ANTENNA ON EQUIPEMENT POLES SUCH AS CAPACITOR BANKS, RECLOSERS, SWITCHES, U.G. DIP, ETC.
- 3. ONLY ONE ANTENNA PER POLE ALLOWED.
- 4. CAUTION: DISCONNECT POWER TO ANTENNA BEFORE WORKING ON POLE IN AREA ABOVE RF WARNING SIGN.
 CALL JOINT USE UNIT TO COORDINATE DISCONNECTION WITH TELECOM COMPANY, EXCEPT IN CASE OF
 EMERGENCY.
- A MINIMUM CLASS 3 POLE IS REQUIRED. IF POLE EXCEEDS 60' ABOVE GROUND, CONTACT DISTRIBUTION STANDARDS FOR STRENGTH AND LOADING ANALYSIS.
- 6. ANTENNA OWNER MUST INSTALL AN RF WARNING SIGN ON THE POLE AT THE LEVEL WHERE THE SAFE APPROACH DISTANCE ENDS FOR FCC GENERAL POPULATION/ UNCONTROLLED CLASS LIMITS. WARNING SIGN "WARNING ANTENNA RADIATION, MINIMUM APPROACH DISTANCE IS X_FT."
- 7. ALL ANTENNA DESIGNS MUST BE APPROVED BY DISTRIBUTION ENGINEERING.
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